

***United States Court of Appeals
for the Second Circuit***



APPENDIX

B

77-2102

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARTIN HERNANDEZ and VICTOR HERNANDEZ,
Petitioners-Appellants,

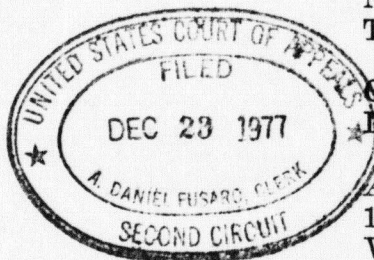
v.

WALTER FOGG, Superintendent,
Green Haven Correctional Facility,
Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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(pp. 1a & 2a)

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PLAINTIFFS

HERNANDEZ, MARTIN
HERNANDEZ, VICTOR

FOGG, WALTER, warden
Correctional Facility

8/31

CAUSE

WRIT OF HABEAS CORPUS
28 USC 2854

This case is transferred from the
United States District Court for
the Eastern District of New York.

F.

ATTORNEYS

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1a

☐ CHECK HERE CASE WAS FILED IN FORWARD	DATE	FILING FEES PAID	C.D. NUMBER	STATISTICAL CARDS
	001	RECEIPT NUMBER		CARD ☒ DATE MAILED
				JS-5 ☒ JS-6 68-77

ATE	NR.	PROCEEDINGS
10-27-76	1	Filed petition for writ of habeas corpus, true copy of docket entry and true copy of order of transfer from the United States District Court for the Eastern District of New York to the Southern District New York.
PROCEEDINGS S.D.N.Y.		
11-24-76	2	Filed respondent's (Alan R. Smulevitz) affdvt. in opposition to petitioner's application for writ of habeas corpus.
12-20-76	3	Filed notice of assignment to Werker, J.
01-04-77	4	Filed plaintiffs Traverse.
01-12-77	5	Filed defts affdvt. in opposition.
3-31-77	6.	Filed Petitioners memorandum
08-18-77	7	Filed OPINION # 46283 Petitioners were convicted after trial in 1971 in Westches Cty Court for criminal posesession of dangerous drug. Their habeas corpus petition is based on petitioners contention that corruption pervaded the Spe Investigation Unit of NY City Police Dept. Petitioners claim are refuted by testimony which they cite. etc. The Petition does not therefore set forth sufficient to raise a claim of constitutional proportions and thus must be denied--Werker, J. m/n
8-31-77	8.	Filed petitioner's notice of appeal to the USCA from the order dtd 8-15-77 denying petitioner's relief. Copies mailed to: Hon. Carl A. Vergari District Attorney of Westchester County 111 Grove Street White Plains, N.Y. 10601 Louis J. Lefkowitz Attorney General of th State of N.Y. 2 World Trade Center New York, N.Y. 10047 Memo-End. on notice of appeal. Leave to appeal in forma pauperis granted.....WERKER,J.

NOTICE OF MOTION AND AFFIDAVIT IN SUPPORT OF
MOTION TO VACATE DATED MARCH 15, 1976
(SUPREME COURT, WESTCHESTER COUNTY)
(pp. 3a to 23a)

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

Exhibit A

The People of the State of New York
- against -

Martin Hernandez and
Victor Hernandez

Defendants

NOTICE OF MOTION

Indictment No. 852/70

ESC 1495

Sir:

PLEASE TAKE NOTICE that upon the annexed affidavit of Martin and Victor Hernandez, duly sworn to the 15th day of MARCH, 1976, (and documents attached hereto) and upon the accusatory instrument and all the proceedings heretofore had herein, a motion will be made in the Supreme Court of Westchester County, Motion Part thereof, at Main Street, White Plains, New York, on the 29th day of MARCH, 1976, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as the defendants may be heard, for an Order:

(a) Vacating the judgement heretofore entered against defendants on the 13th day of SEPTEMBER 1971; or

(b) in the alternative, for an Order for a hearing to determine whether such judgement should be vacated on the grounds that the judgement was obtained in violation of defendants' constitutional rights; and for such other and further relief as to the court may seem just and proper.

Dated: MARCH 15, 1976.

Respectfully submitted,

Martin Hernandez
Martin Hernandez

Victor Hernandez 18348
Victor Hernandez

Drawer B
Storrsville, New York 12582

To: Carl Vegari
-3a-
District Attorney of Westchester County
White Plains, New York

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

The People of The State of New York

- against -

Martin Hernandez and
Victor Hernandez

Defendants

AFFIDAVIT IN SUPPORT
OF MOTION TO VACATE

Indictment No. 852/70

State of New York)
County of Dutchess) ss.:

Martin and Victor Hernandez, being duly sworn according to
law, depose and say:

That we are the above named defendants and make this affidavit
in support of a motion to vacate our judgement of conviction upon the
grounds that it was obtained in violation of our fourth, fifth, sixth
and fourteenth amendment rights under the Constitution of the United
States, as provided for by Section 440.10 subdv. (h) of the Criminal
Procedure Law.

Defendants were indicted for the crime of criminal possession
of a dangerous drug in the first degree, a Class A felony, allegedly
committed on the 6th day of November, 1970. Trial was had in this
Court, before Hon. George Beisheim, Jr., and a jury on the 24th day
of June 1971. The case was submitted to the jury and the jury ren-
dered a verdict of guilty. Thereafter, on the 13th day of
September, 1971, defendants were sentenced to terms of twenty-
five years to life and twenty years to life, respectively.

SUMMARY OF THE PEOPLES CASE

The following is a summary of the People's case in order that
we may have an understanding of how evidence, testimony and factual
issues were neatly discarded, covered up and altered.

On November 6, 1970 defendants Martin Hernandez and Victor
Hernandez were arrested with Madeline Pineda (another defendant
under this indictment) and Victor Dragon a/k/a Mario Sepulveda,
at 709 Warburton Avenue, in the city of Yonkers for possession of
four kilos of cocaine, some glass vials and other small quantities
of cocaine.

The People presented their case that this seizure of cocaine
was but a portion of a larger shipment of cocaine smuggled in from
Chile to the United States via ship. They contended that defendants
were discovered and illegal activities unveiled, through the use of

wiretaps and thereafter surveillance.

To prove their case the People produced as witnesses detectives of the Special Investigating Unit of the New York Police Department's Narcotic Unit. It was testified to that initially on September 3, 1970 a wiretap order was signed by Justice Jaun A. Sandifer, Supreme Court, New York County for interception of James Miller's (a/k/a Pluggie) conversations which were drug related. That through wiretaps on Miller's phone SIU detectives learned that Enrique Hernandez (the brother of defendants herein) was also involved in drug traffic (cocaine) and thereafter obtained a wiretap for Enrique Hernandez's phone also.

That through wiretaps on Enrique Hernandez's phone detectives of SIU learned Madeline Pineda was involved in cocaine traffic and a wiretap was obtained for her phone. Tapes were introduced in which detectives of SIU interpreted their conversations as related to drugs. That through these wiretaps the detectives were lead to Martin Hernandez, Victor Hernandez and Victor Dragon.

After defendants' arrest on November 6, 1970, and while incarcerated in the Westchester County jail, Victor Dragon decided to become a witness for the People. He testified at trial that he was a Chilean, arranged to have the cocaine brought to this country on the S.S. Maipo on November 2, 1970, for the defendants herein and that Madeline Pineda was a go-between for the transactions.

Detectives of SIU testified that through the wiretaps on Pineda's phone they learned that Dragon was bringing the cocaine to Pineda's 709 Warburton Avenue apartment in the morning hours of November 6, 1970. It was also testified to that the crucial conversation of what time your defendants were to pick up the cocaine was not recorded on tape because of a mechanical difficulty, but was heard live by SIU Detectives.

Knowing the time of arrival of Dragon with the cocaine, SIU staked out the building, saw Dragon arrive with the cocaine in a shopping bag and watched him enter the eighth floor apartment of Pineda. They further testified that they held their lookout posts and saw defendants arrive and go in Pineda's apartment. That when your

defendants departed they were carrying a shopping bag, and SIU made their arrests, while taking defendants back into Pineda's apartment to also arrest her and Dragon.

Motions challenging the validity of the initial wiretap on Miller's phone which lead to a succession of others were denied by Judge Sullivan on May 12, 1971, and also during the trial by Judge Beishain. Requests to have all of the original tapes turned over to the defense and not just the piecemeal portions which the People submitted were also denied.

STATEMENT OF THE FACTS

The following statement of facts will differ to such a great degree from what has been previously stated as the People's case which secured our convictions that parenthetical references will be used to note the source of where many of these facts came. It is to be noted that the following was not known by your defendants or their counsel at the time of our trial in Westchester County and therefore we could not have been expected to present these facts at that time. Thus the following is largely outside of the record:

It is now a well known fact that the Special Investigating Unit (SIU) of the New York City Police Department, now defunct, was the most corrupt, law breaking bodies ever to be unleashed under the guise of law enforcement. From the theft of over 112 million dollars worth of French heroin to perjury before grand juries, illegal wire-tapping, drug selling and murder. All have been attributed to SIU. Of course to obtain informers and more easily secured convictions many of these detectives have been allowed to plead guilty to lesser crimes. For whatever benefits this may serve in securing convictions against other corrupt detectives, it does not erase the perversions of justice which SIU left in its past.

I

The Wiretap Order For Miller's
Phone is Used As A Stop-Gap
By SIU Detectives

It will be shown in this affidavit that Martin Hernandez, Victor Hernandez, Madeline Pineda and Victor Dragon were not luckily come upon by the wire-tap of an alleged street level dealer named James Miller which was signed on September 3, 1970, but rather by

illegal wiretapping and illegal search and seizure months before the order for Miller's phone was even sought.

It will be shown that detectives of SIU committed perjury when they testified they first saw Madeline Pineda and identified her voice in October, 1970, while walking to a movie with her mother. It will be shown that detectives of SIU committed perjury when they say they recognized Victor Hernandez and his voice while walking past an open phone booth. It will be shown that your defendants were known to SIU, our activities, identities and dwellings long before September 3, 1970.

It will be shown that in June of 1970, SIU had placed an illegal wiretap on a bar and restaurant in Manhattan called the Chile Lindo. That through these illegal wiretaps, surveillance and pictures, defendants activities were uncovered and the Miller legal wiretap order was obtained as the only means in which to stop gap and legitimize what previously were months of information gained by illegal wiretaps. In a sense it is much like the way dirty money is "laundered" to come out looking clean.

II

The Chile Lindo Wiretap

During the months of June 1970 and through November, 1970, a series of illegal wiretaps were recorded on the telephone in the Chile Lindo restaurant on 23rd Street in Manhattan. This was testified to in Federal Court, Eastern District of New York, on November 15, 1974. Hon. Jack B. Weinstein presiding * (FH, p. 6-7) by former detectives Settelle of SIU, now a federal prisoner and government informer. The illegal wiretap was maintained from a listening post at the Atkins Glass Store, 152 West 24th Street, in Manhattan.

Surveillance was conducted of all persons who entered and left the Chile Lindo (FH, p. 8), and leads were gotten as to drug trafficking (FH, 12).

*Note: Reference abbreviations (FH) refer to the federal hearing minutes of November 15, 1974. (ST) refers to the State transcript of the trial in Westchester County in 1971 and (FT) refers to the federal conspiracy trial, held in 1971.

"The lead, you know, we got was just general talk about drug traffic. We suspected drug traffic of the people who frequented there." (PH, 8,12-13)

Once leads were gotten through illegal wiretaps they were not divulged to prosecutors or defense counsel (PH p 16). Thus, we have a situation where clearly it can never be realized if these detective of SIU are lying or not.

Defendants had begun to learn in 1973 and 1974, through news coverage in the New York Times, Daily News and television news programs of Special State Prosecutor Maurice Madjari's uncovering of corruption, perjury and illegal wiretapping of SIU. We had long suspected that the wiretap tapes in our case were altered and that the Miller wiretap was grounded on lies. Take for instance the testimony of Madeline Pineda:

"It was longer than that...the only conversation that I heard here was part of the conversation with another conversation."
(ST p. 1119)

Thus the implication is that the tapes were spliced and whole conversations made from other portions of the tapes.

Nevertheless, the following testimony will establish that Victor Hernandez, Martin Hernandez, Madeline Pineda, Enrique Hernandez, and Victor Dragon used the Chile Lindo as a sort of headquarters where they could be found and meeting place for drug transactions during the period SIU maintained illegal wiretaps on those premises.

Dragon direct: On November 5, 1970, did there come a time when you went to the Chile Lindo restaurant?

A. Yes (ST, p 190)

Q. Who was present at that time?

A. That night, there were present Martin (Pee Wee) Hernandez, Victor Hernandez and Madeline Pineda (ST, p 190)

A. We agreed, and I'm supposed to call her as soon as I have the cocaine in my possession (ST, p 191)

Dragon cross: ...you met Madeline Pineda on August 31, 1970, at the Chile Lindo; is that correct?

A. Yes sir.

Pineda direct: A. I met Mario through his wife in Chile Lindo.
that is a restaurant.

Q. Is that commonly called the House of C?

A. Yes. (ST, p 993)

Q. And do you recall something to the effect of we have near
it, or something like 40 suits; what did that refer to?

A. That was another conversation where Imada would talk to Hank
when we were in Chile Lindo.... (ST, p 1923)

Q. And did you all frequent and socialize at this Chilean House?

A. Sometimes, yes. (ST, p 998)

Then of course there is the testimony of Victor Dragon a/k/a
Mario Sepulveda who testified for the People in the Westchester
County trial and again in Federal Court:

Dragon/Sepulveda direct:

Q. During the conversation you had when you first met him, to
the best of your recollection what did you say to him and
what did he say to you?

A. ...that we should meet on the following day at the Chile
Lindo restaurant and then we would talk as to how we were
going to get that cocaine off. (PT, p 384)

Dragon/Sepulveda:

Q. And I believe you stated that Mr. Olate asked you to meet him
the next day?

A. Yes, at the restaurant, Chile Lindo.

Q. Now did you meet Mr. Olate at the Chile Lindo?

A. Yes sir.

Q. Where is the Chile Lindo located?

A. The Chile Lindo is located on 23rd Street between Sixth and
Seventh Avenues.

Q. Now do you recall the date that you met Nicodemus Olate for
the first time in the Chile Lindo?

A. It was on the second day of September, 1970.

In June of 1970, Dragon had a conversation in the Chile Lindo with one Eduardo Borrone (PT, p 389) another co-defendant in defendants' conspiracy trial.

Q. Mr. Sepulveda, where did this conversation with Mr. Borrone take place?

A. I had this conversation with Mr. Borrone and another person at the Chile Lindo Restaurant (PT, p 391).

Further testimony By Dragon/Sepulveda further reveals that the Chile Lindo was the meeting spot of your defendants:

Dragon/Sepulveda direct:

Q. Do you recall whether or not you saw Mr. Olate on September 3, 1970?

A. Yes, I saw him, sir.

Q. Where did you see him?

A. We had agreed to always meet at the Chile Lindo so I met him at the Chile Lindo.

Q. Did you meet him at a particular time?

A. I always went to the Chile Lindo in the afternoon. So after 6:00 o'clock, he met me there. (PT, p 395)

Q. Did you say the date that you know the ship arrived?

A. The ship arrived on the 4th day of September.

Q. How do you know that?

A. Well, because on the 4th of September, I had a meeting with Mr. Olate at the Chile Lindo. (PT, p 396)

Q. Calling your attention now to the next day, which is September 3, 1970, at about nine o'clock in the morning where were you?

A. More or less at that time I arrived at the Chile Lindo Restaurant (PT, p 420) A little while later while awaiting at the door (Chile Lindo) Agapito and Eduardo Borrone arrived.

Q. Did you stay at the Chile Lindo or did you go somewhere else?

A. Once the other two had arrived we proceeded to 42nd Street to purchase the equipment. (PT, p 420)

Dragon is referring here to the frog man equipment used to remove the cocaine from the S.S. Maipo. We are almost compelled to assume that the detectives of SIU who had the Chile Lindo under surveillance would not miss the opportunity to tail these three

individuals who chose to meet at 9:00 o'clock in the morning in front of the hottest drug spot on 23rd Street.

In any event we know SIU had the bar under constant watch and that they followed all persons who left that bar. If they did follow they would have been led to:

A. We went to 42nd Street.

Q. And you went into the store with Agapito Gu-Leon and Eduardo Borrone?

A. Yes sir. (PT, p 421)

Q. And to best of your recollection what did you buy?

A. We bought a rubber suit...Flippers, the hat, a rubber hat, a tube, and something else... (PT, p 422)

After purchasing the frog man equipment the trio went to the apartment of Eduardo Borrone then Dragon went to where he lived. The apartment of Madeline Pineda, 709 Warburton Avenue. (PT, p 423-425)

Thus it can readily be seen that even if SIU for some unknown reason on this day did not trail Dragon, Agapito and Borrone to purchase the skin diving equipment they surely trailed Dragon home on some night or morning after leaving the Chile Lindo. The evidence clearly supports this:

"Surveillance was conducted of all persons who entered and left the Chile Lindo (Sottile FB, p 8)

Moreover, Dragon after going to Madeline Pineda's house from Borrone's asked her if she could drive him to the Brooklyn docks by car. (PT, p 426) The car was a maroon 1969 LeMans. But before going to the docks Madeline and Dragon went to Borrone's house (PT, p 427) to pick him up and then went to see the Chilean ship (PT, p 427). By this time it was 3:00 o'clock in the afternoon so they left the pier and went to the Chile Lindo Restaurant together (PT, p 429). Thus if SIU lost Dragon before, they surely picked him up again at this point.

Defendants present the facts in this manner so there can be no mistake made in how all these cocaine activities centered around the Chile Lindo Restaurant before the legal wiretaps were sought for Miller, Hernandez and Pineda.

- 2 -

On page 420 of the federal transcript that same afternoon, Dragon, Borrone, Olate, Arnaldo and Celestino Valverde left the Chile Lindo Restaurant to go back to the Brooklyn Piers to check out a good spot where the cocaine could be brought in off the ship. Then upon seeing the place, returned to the Chile Lindo Restaurant (FT, p 431). Even the most naive person knowing the facts as they are now, would not believe SIU were not on the tails of these individuals.

The next day September 6, 1970, Dragon meets Olate and Quintinilla at Chile Lindo at 6:00 p.m. to go and bring in the cocaine (FT, p 1133).. Subsequently 21 kilograms of cocaine were removed from the S.S. Maipo by Borrone and Valverde and taken to the home of Celestino Valverde (FT, p 443).

Defendants would like to make note for clarification of the Court that the aforementioned 21 kilograms brought from the S.S. Maipo September 6, 1970 is not the shipment in which we are convicted of possessing four kilos of cocaine. Our convictions stem from a later shipment on November 2, 1970.

Defendants contend that they were doing business with Madeline Pineda and Victor Dragon since June of 1970 (FT, p 461-462). It is evident from the quoted portions of the various transcripts that the Chile Lindo was headquarters for our activities. Besides using the telephone there we frequented the bar on a daily basis. At this point we wish to introduce the affidavit of Victor Hernandez as Exhibit A.

III

SIU UNLAWFULLY STOPS VICTOR HERNANDEZ IN SEPTEMBER 1970

The September 5 shipment of cocaine which came off the S.S. Maipo apparently escaped initial detection by SIU because through a mishap in timing the cocaine Borrone and Valverde were thrown off schedule (FT, p 433-443). Apparently angered by missing this shipment when it first arrived detectives of SIU stopped your defendant Victor Hernandez at 23rd Street and 8th Avenue after leaving the Chile Lindo (see affidavit attached).

While the significance of defendant Victor Hernandez being stopped by SIU in September 1970 had no special meaning to us at the time we were on trial in Westchester in 1971 for possession of 4 kilos of cocaine was because we did not then know the Chile Lindo was tapped. Nor did we know that many SIU detectives had committed crimes and that two years later those same detectives would be federal prisoners.

At this point we continue to show how the Chile Lindo was the central base for these cocaine operations.

On September 8, 1970 Dragon goes to Enrique Hernandez's house to find out about payment for the cocaine (FT, p 484).

Q. Mr. Sepulveda (Dragon) do you recall where you were during the afternoon of September 11, 1970?

A. Yes sir.

Q. Where?

A. At the Chile Lindo Restaurant.. (FT, p 511)

Defendants now refer at this point to the November 5, shipment of cocaine and show:

Dragon/Sepulveda:

Q. Did there come a time when you left Mr. Olate's apartment?

A. At about 9:30 more or less in the evening, I asked Mr. Olate for the car, since I had to go to an appointment at the Chile Lindo with Mrs. Pineda.

Q. And did you meet anybody there?

A. When I got to the Chile Lindo, inside I met with Madeline Pineda and I told her that the ship was at the dock, to which she answered "Yes, yes, we have already seen it." She was in the company of Martin Hernandez and Victor Hernandez.

Defendants contend that we have used the phone in the Chile Lindo hundreds of times during June of 1970 through November of 1970. If we wanted to find out if Dragon was there we would call. If we wanted Enrique or Madeline we would call. If they wanted us, they would either call from Chile Lindo or call to Chile Lindo.

Enrique Hernandez:

Q. During the months of early September until the middle of November 1979, did you have occasion to talk over the telephone with one James Miller?

A. Yes.

Q. How many occasions?

A. Quite a few occasions.

Q. Did you have occasion to talk over the telephone with your brother, Martin Hernandez and Victor Hernandez?

A. Quite a few occasions (PH, p 44-45).

Q. Did you have occasion to talk over the telephone with Madeline Pineda?

A. Yes.

Q. Did you have occasion to talk over the telephone with Mario Sepulveda?

A. Quite a few occasions (PH, p 45).

Q. Did you ever have occasion to use the telephone at the Chile Lindo restaurant?

A. Quite a few times.

Q. Could you tell us when you used their phone and who you talked to?

A. Well, I mostly in around September, I called Madeline Pineda quite a few times. I called my mother and I called James Miller.

Q. On any of the conversations you had with any of these people, was it related to narcotic drugs?

A. Yes.

Q. Did you know that the Chile Lindo telephone was tapped?

A. No. (PH, p 45-46)

Q. Did you ever use your name when you made these phone calls?

A. Yes.

Q. Did you ever receive any telephone calls at the Chile Lindo Restaurant?

A. Quite a few.

Q. From who?

A. Mario Sepulveda, Madeline Pineda, and Victor and Martin Hernandez, my brothers. (PH, p 46)

THE INFORMANT ON WHICH
THE MILLER WIRETAP WAS
BASED IS FICTITIOUS

As previously stated the wiretap on James Miller's phone who SIU claims lead them to Enrique Hernandez, Madeline Pineda, Martin Hernandez, Victor Hernandez and Victor Dragon/Sepulveda was predicated upon a wiretap order which was signed on September 3, 1970, by Justice Jaun A. Sandifer, Supreme Court, New York County.

Judge Sullivan on May 12, 1971, denied a motion made in Westchester County, made by defendants to challenge the legality of the Miller wiretap.

Justice George Beisheim, Jr., during our trial in Westchester County, repeatedly denied motions to challenge the Miller wiretap ruling that Judge Sullivan's ruling was the law of the case. However, the information and evidence which we now submit in this affidavit was not available to us at the time of trial and in fact we had no knowledge of the information previously stated herein.

James Miller was a co-defendant along with your defendants herein during our Federal conspiracy trial. Miller's attorney Mr. Emanuel Paverstein made a motion as follows:

Mr. Paverstein: Yes, sir, I have the same motion as Mr. Larva (defendant's counsel). I would like a hearing, Your Honor, to determine if in fact the eavesdropping warrants were legally instituted in the first instance as against my client James Miller. (PT, p 22)

Mr. Paverstein: Well, Judge, I would more or less — I am claiming that in fact this informant is fictitious and does not e

It was testified to by detective Broder and Cruet of SIU that an unidentified informant met Det. Brodner by chance and said he wanted to talk to him. The informant said James Miller was selling drugs on August 20, 1970 at 6:00 p.m. Brodner and Cruet arranged for the informant to call Miller's apartment on a telephone in Harlem Hospital. Brodner claims he shared the earphone with the

informant, and that Miller engaged in a general drug conversation discussing price and quality of "H" meaning heroin. (FT, pgs 23-38)

In order to secure the initial wiretap for Miller's phone Brodeur and Cruet also related to the Court that they observed three drug dealers enter Miller's apartment while they conducted surveillance. In Federal Court Mr. Paverstein brought out the truth to this:

Brodeur direct by Mr. Paverstein:

- Q. Now, you stated in your affidavit, paragraph 10, officer, that "three known medium scale dealers" entered and left apartment 8-J at separate intervals from 4:00 p.m. to 8:00 p.m., is that correct?
- A. That's correct.
- Q. Do you know the names of these three particular individuals?
- A. No.
- Q. Were you ever in Court when they were convicted of any possession of drugs or any other crime?
- A. No.
- Q. Did your partner, at that time, Detective Cruet - did he inform you of anything relating to the medium scale sellers?
- A. Yes.
- Q. And it was based on what he told you that you put down in the affidavit that these are three known medium scale sellers, or were they known to you?
- A. Known to him. (FT, pgs 52-53).

As can be seen from the above Detective Brodeur in submitting the affidavit for Miller's wiretap was not personally aware of these three medium scale dealers who were supposed to be seen entering Miller's apartment. Here is what Detective Cruet had to say:

Cruet direct by Mr. Paverstein:

- Q. Now, do you know the names of the three people in the affidavit that are known as medium scale dealers? Do you know their names?
- A. No, I do not.
- Q. Have you ever placed them under arrest?
- A. No, I did not.
- Q. Were you ever present in Court when they were convicted of any crime?
- A. No, I was not. (FT, p 63)

Thereafter from pages 64 to 71 Cruet tries to explain how in 1966 when he was working undercover someone told him that one of the persons who he saw enter Miller's apartment in 1970 was a drug dealer.

Q. Someone who you don't remember now told you that he dealt in drugs?

A. That is correct.

Mr. Paverstain urged Judge Weinfeld in federal court that "the only thing we have to go by is the credibility of an officer making out the affidavit." However, the Court denied the motion and accepted the testimony of Officers Brodner and Cruet as truth.

Again your defendants cannot stress too hard that Judge Weinfeld's ruling like Judge Beisheim's and Judge Sullivan's and Judge Sandifer's were all made before any knowledge of the wrongdoing of SIU was discovered and the contents of this instant affidavit were made known.

Lastly, defendants would like to point out that of all the large quantities of cocaine which were shown to have been brought to the United States from Chile, only two actual seizures were brought to light by SIU.

One seizure involved the four kilos for which defendants stand convicted of possessing at 709 Warburton Avenue in Yonkers, New York, on November 6, 1970.

The other involved one Gilberto Pasqual who was also charged with receiving a quantity of cocaine from the same shipment your defendants' cocaine was alleged to have come from. SIU Detective Sattile testified that as the result of information given to him by a confidential informant he learned that (Gilberto Pasqual) "there was a man, a Cuban, about 5'4" weighing 130 lbs., round faced, dark haired man living in Room 1717 of the Century Paramount Hotel at 235 West 46th Street." (PT, p 202) Sattile further testified that the informant "told me that, that man is involved in narcotics." (PT, p 203)

Sattile after going to the Century Paramount Hotel at 46th Street and 8th Avenue on September 10, 1970, found Pasqual in the bar of the hotel and struck up a conversation with him, watched him and then saw Nicodemus Olate and Fusto Quentevilla arrive in a 69 Ford maroon sedan. This is of course the same car which Madeline Pineda drove Dragon to the Brooklyn docks in and later back to the Chile Lindo as previously mentioned in this affidavit. In fact, Detective Sattile testified that:

Sattile: "I immediately recognized the car as a car that I had seen on previous occasions, a car which, in fact, I had followed on previous occasions." (FT, p 205)

Sattile then later testified that Pasqual got in the car at 46th Street and 8th Avenue with Olate and Quintinilla, drove around the block and returned and parked in front of the hotel. Sattile testified he saw a brown envelope on the front seat which was torn at the corner and revealed cocaine to him. He then arrested Pasqual, Olate and Quintinilla.

Of the utmost importance to all this is the fact that Sattile testified that he came upon Pasqual as a result of a confidential informant not because of a Chile Lindo wiretap.

Q. Would that include wiretaps, too?

A. No. (FT, p 235)

Which of course is a lie!

The following is the testimony of former Detective Sattile, now a federal prisoner, concerning the Pasqual, Olate, Quintinilla arrest:

Sattile:

Q. Did you conduct an investigation where a Mr. Olate and Mr. Quintinilla were suspects?

A. Yes. (FH, p 5)

Q. Did they frequent the Chile Lindo Restaurant?

A. I had seen them there, yes.

Q. Did you have an illegal wiretap at any time on the Chile Lindo between June and October of 1970?

A. Yes. (FH, p 6-7)

- Q. Did the illegal wiretap furnish you any leads concerning the arrest of Olate and Quintinilla?
- A. Only to the extent the wiretap provided information on a certain room number in the Century Paramount Hotel; information that that person who later was determined to be Gilberto Pasqual was involved in narcotics trafficking. (FH, p 11-12)
- Q. At any time did you divulge to the Assistant U.S. Attorney or to any defense counsel that there was an illegal wiretap present during the course of your surveillance and investigation of those defendants?
- A. No. (FH, p 16)
- Q. Besides the officers you mentioned, what other officers were aware of the existence of this illegal wiretap?
- A. Lieutenant Egan. (FH, p 16-17)

Settles in a purging epithet to Judge Weinfeld said:

"Your Honor, with respect to the fact that I originally went to the Century Paramount as a result of what an informant told me, I lied." (FH, p 31)

CONCLUSION

Your defendants contend that former SIU detectives, Egan, Settles, Cruet, Brodner and others were all working together as a whole in their illegal wiretapping activities and illegal searches. This is supported by the evidence addressed in this affidavit and what will be presented in the Court.

The individuals who perpetrated the illegal information gathering will not readily incriminate themselves by admitting their guilt and District Attorneys will not readily encourage them to do so in order to save their already secured convictions.

There will also be greater opposition against our presentation of the claims herein due to the fact fliers were put out by the district attorney's office of Westchester County quoting the newspapers when Mr. Vargari ran for office. He cited our conviction as a reason why he should be re-elected. We sincerely hope that our plight in presenting the issues herein will not be hampered by any

unfair and overzealousness which the district attorney's office of this county has shown in the past.

Defendants contend that a hearing must be held where the confidential informant be produced not just an undercover member stating that an unknown person exists.

That all tape recordings be produced (originals) and turned over to the defendants for the purpose of this hearing.

That upon setting a date for hearing defendants be notified in advance so we may retain counsel in our behalf.

We further contend that the rationale of United States v. Andolschek 142 F.2d 503, 506 (2nd Cir. 1944) cited with approval in Dennis v. United States, 384 U.S. 53 (1967), dictates that unless the government is willing to open its files to the extent necessary to insure, through adversary procedures in open court that its unlawful conduct did not produce leads or evidence which contributed to defendants' convictions, the case must be reversed. (See Jencks v. United States, 353 U.S. at 670, 672).

Moreover, the claim that investigators files reflecting lawful techniques should be kept free from scrutiny would be more graciously received if experience showed that the government consistently and carefully separated illegally gathered material from that legally gathered, to permit easy identification of the source of any given communication or item of intelligence. Defendants refer also to the revelations of the Ellsberg and Watergate cases not to mention the corruption that Special State Prosecutor Maurice Nadjari uncovered in SIU.

The State must not be able to insulate itself with labels as "national security" or "confidential informant."

Wherefore, defendants pray that the Court order an immediate date for a hearing to be held at which time evidence for a hearing to be held at which time evidence be presented and testimony taken and that after said hearing our judgement of convictions be reversed and for any other and further relief that the Court may deem just and proper.

Respectfully submitted,

Martin Hernandez

Martin Hernandez #

Victor Hernandez 18348

Victor Hernandez #

Drawer B
Stormville, New York 12582

Sworn to before me this 15th
day of March, 1976

Edmond W. Gifford, Sr.
Notary Public

EDMOND W. GIFFORD, SR.
NOTARY PUBLIC, State of New York
Residing in Dutchess County
Commission Expires March 30, 1977

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

The People of The State of New York

- against -

Martin Hernandez and
Victor Hernandez

Defendants

AFFIDAVIT OF SERV:

Indictment No. 85:

State of New York)
County of Dutchess) ss.:

Martin and Victor Hernandez, being duly sworn, according to
law, depose and say:

That we have this day caused to be forwarded to the Supreme
Court, County of Westchester, White Plains, New York, two (2)
copies of the annexed motion to vacate together with supporting
affidavit and affidavit of Victor Hernandez, via United States
First Class Mail, Certified (R.R.R.) and one (1) copy to the
persons listed below:

Carl Vegari
District Attorney of
Westchester County
White Plains, New York

Martin Hernandez
Martin Hernandez

Victor Hernandez
Victor Hernandez

Drawer B
Stormville, New York 12582

Sworn to before this 15th
day of March, 1976

Edmond W. Gifford, Sr.
Notary Public

EDMOND W. GIFFORD, SR.
NOTARY PUBLIC, State of New York
Residing in Dutchess County
Commission Expires March 30, 1977

AFFIDAVIT

State of New York)
County of Dutchess) ss.:

Victor Hernandez, being duly sworn according to law, deposes
and says:

That a few days after September 6, 1970, when Mario (Dragon)
brought more cocaine, I was stopped on 23rd Street and 8th Avenue.
I had just left the Chile Lindo Restaurant because I was looking
for Mario to give him \$16,000.00 which I had in a paper bag with
me.

When I stopped for the light in my blue Mustang, a yellow
Checker Cab pulled up alongside me and five people jumped out with
drawn guns saying they were policemen. They ordered me out of the
car and searched it. I am sure they saw and looked into the paper
bag on the seat of my car while searching. But they did not take
or mention the money to me.

Afterwards, they told me to go ahead because they had the
wrong information. Of these five policemen who were dressed in
street clothes, I remember seeing two of them again. They are
Detective Crust and Detective Egan. I saw them both when they
arrested me, my brother Martin, Madeline Pinedo and Victor Dragon
on November 6, 1970, at 709 Warburton Avenue. Since that time I
have seen Crust in Court but have not personally seen Egan again
since my arrest.

Victor Hernandez
Victor Hernandez

Sworn to before me this 15
day of March, 1976.

Edmond W. Gifford, Sr.
Notary Public

EDMOND W. GIFFORD, SR.
NOTARY PUBLIC, State of New York
Residing in Dutchess County
Commission Expires March 30, 1977

AFFIDAVIT IN OPPOSITION BY EUGENE F. CLERKIN
SWORN TO MAY 7, 1976

(pp. 24a to 28a)

SUPREME COURT
COUNTY OF WESTCHESTER

760 1495

-----X

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

MARTIN HERNANDEZ and VICTOR
HERNANDEZ,

Defendants.

AFFIRMATION IN OPPOSITION

Ind.No. 852/70

-----X

STATE OF NEW YORK

COUNTY OF WESTCHESTER

} ss:

EUGENE F. CLERKIN, an attorney duly admitted to practice in the Courts of the State of New York affirms the following under the penalties of perjury, that he is an Assistant District Attorney of Westchester County and submits this affirmation in opposition to the defendants' motion which seeks an order of this Court to vacate judgment. This affirmation is made upon information and belief, the source of which is the file of this matter maintained by the office of the District Attorney.

On September 13, 1971 the defendants were convicted of the crime of Possession of a Dangerous Drug in the First Degree. The defendant Martin Hernandez was sentenced to a prison term of from 25 years to life and Victor Hernandez to a term of 20 years to life by the Hon. George Beisheim. They appealed the judgment to the Appellate Division of the Supreme Court, Second Department.

In its Order of March 19, 1973 the Appellate Division unanimously affirmed the judgment of the Westchester County Court. A subsequent application for leave to appeal to the Court of Appeals was denied by then Chief Judge Fuld.

The phrase "trial by newspapers" has pejorative connotations fully recognized by members of the legal profession. However, the defendants' instant papers present the unique situation of an attempt to vacate a judgment through use of selected items appearing in our media. Throughout their papers the defendants refer to reported reprehensible instances of police corruption in the New York City Police Department uncovered by investigators in recent years. The discredited and now defunct Special Investigations Unit of the New York Police Department Narcotics Bureau attracts special attention in the defendants' spurious argument that their conviction was somehow tainted by illegal activities of various members of the Special Investigations Unit. Of course such an argument would be incomplete without an allusion to Watergate and its implications and the defendants do not disappoint us (Defendants Papers p. 17)

A motion to vacate judgment may be denied if it is supported by conclusionary allegations (See People v. Cruz, 202 N.Y.S. 2d 556, affirmed 13 AD 2d 941, affirmed 11 N.Y. 2d 840; cert. den. 371 U.S. 927). The convoluted conundrum contrived by these defendants is easily resolved. Their motion should be summarily denied. Not one iota of new evidence has been presented.

Instead the defendants resurrect the same specious allegations they set forth at trial and in their appeal questioning the validity of police search warrants and use of wiretap information utilized in the police investigation. As was proved at trial and confirmed on appeal, the information leading to the arrest and conviction of these defendants was properly and judiciously obtained. On September 3, 1970 a wiretap order was signed by Justice Sanditer, Supreme Court, New York County for interception of one, James Miller's conversations. This led to further wiretap situations. On September 25, 1970 Honorable Gerald P. Culkin signed an order permitting the interception of certain calls over the phone of the defendants' brother, Enrique. During the course of that interception, the police overheard conversations between Hernandez and Madeline Pineda, co-defendant with these defendants, indicating that Pineda was importing large quantities of narcotic drugs from her husband, Hugo, in Chile. An Order was therefore signed by Honorable George Beisheim, Jr., Westchester County Court, on October 21, 1970 permitting the interception of certain calls over Pineda's telephone. The information obtained from these telephone communications between the parties supported the police suspicions about the defendants' drug connections. In each application for a wiretap order, the police sought to overhear conversations relating to large scale narcotics transactions and in each case such was properly permitted by the Court order.

The defendants' brazenly admit that they were involved in many illegal activities that they have not been prosecuted for. For instance, they submit that they were participants in the removal of 21 kilograms of cocaine from the S. S. Maipo on September 6, 1973 and made clear that this was not the shipment for which they were later convicted. Their contention is that the police had them under surveillance for a long time prior to their arrest and that their arrest, even though the product of legal wiretaps, somehow was tainted by previous activities of the police. This contentions sole support is select portions of testimony culled from minutes of a federal hearing held on November 15, 1974. No explanation is given by the defendants for their failure to present this information at a earlier date. The matters they refer to all apparently took place a number of years ago. When new evidence has been discovered since the entry of judgment based upon a verdict of guilty after trial, which could not have been produced by the defendants at the trial even with due diligence on their part, and which is of such a character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendants' motion to vacate judgment based upon such ground may be made provided that such motion be made with due diligence after the discovery of such alleged new evidence (CPL 440.10(g)). The People respectfully submit that the defendants have not created a probability that their case would have turned out any differently because of the allegations made in their present papers and in the alternative certainly have not acted with the due diligence clearly required

by the statute.

WHEREFORE, your deponent prays that the instant motion
be in all respects denied.

Affirmed To Be True

Dated: White Plains, New York
May 7, 1976.

Eugene F. Clerkin
Eugene F. Clerkin
Assistant District Attorney

TRAVERSE DATED MAY 20, 1976
(SUPREME COURT, WESTCHESTER COUNTY)
(pp. 29a to 33a)

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER

76C 1495

THE PEOPLE OF THE STATE OF NEW YORK

- against -

MARTIN HERNANDEZ and
VICTOR HERNANDEZ

TRAVERSE
Indictment No. 852/

Defendants

STATE OF NEW YORK)
COUNTY OF DUTCHESS) ss.:

MARTIN HERNANDEZ and VICTOR HERNANDEZ, both being duly sworn according to law, depose and say:

That we are the above named defendants and submit this affidavit to traverse and rebut each and every one of the erroneous statements that the office of the Westchester County District Attorney has put forth in opposition to our motion to vacate the judgement of conviction and order a hearing thereon.

The opposition herein referred to was received by your defendants on May 10, 1976, and is sworn to by an Assistant District Attorney by the name of Eugene F. Clerkin. Defendants contend that Assistant District Attorney Clerkins' sworn affirmation is not only specious but borders on obstruction of justice in that it is a most visible attempt to brand your defendants as perjurers who have "brazenly...contrived a convoluted conundrum" of allegations. Since these moving papers are sworn to under oath to be true, Mr. Clerkin will run the risk of being a defendant in a civil damage suit for submitting what amounts to pure rigamarole.

At the outset it is claimed by A.D.A. Clerkin that:

"the phrase trial by newspapers has pejorative connotations fully recognized by members of the legal profession.

However, the defendants' instant papers present the unique situation of an attempt to vacate a judgement through the use of selected items appearing in our media." (opposition at page 2)

The above statement, sworn to under oath by the learned Assistant District Attorney, is patently an outright attempt by the office of the Westchester County District Attorney to submit a perjured document to this Court in order that defendants' allegations will be circumvented and denied.

We defy the Assistant District Attorney, or anyone for that matter, to find a single allegation raised in our post conviction motion which is based on or supported by any "selected" news items or for that matter any reference to any news article whatsoever.

Your defendants have presented serious and of course embarrassing claims of constitutional violations by specific police officers of the now-defunct and corrupt Special Investigations Unit of the New York City Police Department. All evidence which supports our claims comes from four (4) sources. They are:

- (a) state trial minutes
- (b) federal trial minutes
- (c) federal hearing of November 15, 1974
- (d) defendants' affidavits and testimony

We rely on no newspaper accounts or "selected" news articles and our petition speaks for itself. Such a statement that we do rely on news coverage is only the malicious lie of A.D.A. Clerkin who would further insist to this Court that:

"Their motion should be summarily denied. Not one iota of new evidence has been presented." (opposition at page 2)

Fortunately, this Court has a copy of our motion to vacate and we respectfully direct the Court's attention to page 3 thereof where we state:

"The following statement of facts will differ to such a great degree from what has been previously stated as the People's case which secured our convictions that parenthetical references will be used to note the source of where many of these facts came. It is to be noted that the following was not known by your defendants or their counsel at the time of our trial in Westchester County and therefore we could not have been expected to present these facts at that time. Thus the following is largely outside of the record."

In spite of the above statement of your defendants and the issues presented in our motion to vacate, A.D.A. Clerkin makes the following remark in his opposition:

"Instead the defendants resurrect the same specious allegations they set forth at trial and in their appeal questioning the validity of police search warrants and use of wiretap information utilized in the police investigation." (opposition at page 3)

Defendants would respectfully ask this Court to summon our briefs on appeal and the trial record of our trial and take judicial notice of the fact that none of the allegations raised in our motion to vacate were ever presented during the trial or on appeal.

No one had knowledge except for the corrupt detectives whose mouths were closed, that an illegal wiretap was in existence at the time we went to trial in both state and federal courts. Our motion papers specifically reveal that not until almost four (4) years later (November 15, 1974), that we learned an illegal wiretap was in effect on our persons and that it was maintained by the officers who arrested us. As unpopular

as our allegations may be, they cannot be avoided by deception as A.D.A. Clerkin has tried to do.

Lastly, the Assistant District Attorney in his opposition raises the false premise that your defendants are barred from raising these issues, because:

"No explanation is given by the defendants for their failure to present this information at an earlier date. The matters they refer to all apparently took place a number of years ago."
(opposition at page 4)

To be precise the allegations we present occurred almost six (6) years ago. However, it was not until November, 1974, that we learned of the connection between the offenses for which certain Special Investigations Unit detectives were convicted of in federal court and the connection to our case. It was not until OCTOBER, 1975, that the Honorable George Beisheim ordered that our Westchester County trial minutes be loaned to us for the purpose of preparing our instant motion to vacate. (See exhibit A). It was not until JANUARY, 1976 that the Honorable Jack B. Weinstein, U.S.D.J., ordered that our federal trial minutes be loaned to us for the purpose of preparing our instant motion to vacate. (See Exhibit B).

All in all, we submitted the instant motion to vacate this conviction to this court on March 15, 1976, within approximately _____ months after finally receiving the federal trial minutes, without which this motion could not have been possible. For laymen, we think our submission was very timely.

We submit that we have met and traversed the opposition of A.D.A. Clerkin and have shown his remarks to be unworthy of

consideration at the least. Nothing stands between this Court and its power to order a hearing on the issues involved except the ordering of our production in Court.

We sincerely believe that Mr. Vagari, the District Attorney of Westchester County, may have a greater stake in this case other than just assuring that our convictions remain affirmed. Without belcaguring the point, we again refer to the fact that Mr. Vagari based his re-election campaign on our convictions by using fear tactics in passing out flyers in the entire county citing our convictions as reason for his re-election campaign. That very fact has put a stigma on your defendants which we feel will never secure us a fair hearing in Westchester County.

Nevertheless, the law mandates we exhaust state remedies in an orderly fashion and we pray we receive the relief we request.

Respectfully submitted,

Martin Hernandez
Martin Hernandez, No. 18347

Victor Hernandez
Victor Hernandez, No. 18348

Drawer B
Stormville, New York 12582

SWORN TO BEFORE ME THIS

30 day of May, 1976.

Carolyn L. Ressler
Notary Public

CAROLYN L. RESSLER
Notary Public
Dutchess County
My Commission Expires Mar. 30, 1977

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment #852/70

MARTIN HERNANDEZ and VICTOR HERNANDEZ,

Defendants.

BEISHEIM, J.

Defendants move, pro se, for an order vacating the judgment of conviction heretofore entered against each of the defendants on September 13, 1971, or, in the alternative, for an order for a hearing to determine whether such judgment should be vacated upon the grounds that it was obtained in violation of their Fourth, Fifth, Sixth and Fourteenth Amendment rights under the Constitution of the United States, and further, as provided for by section 440.10, subd. (h), of the Criminal Procedure Law.

A jury trial was held in the Westchester County Court in the instant matter before the Hon. George Beisheim, Jr., and thereafter these defendants were convicted on September 13, 1971, of the crime of Possession of a Dangerous Drug in the First Degree. Martin Hernandez was sentenced to a prison term of 25 years to life, and Victor Hernandez was sentenced to a term of 20 years to life. The judgment of conviction of the Westchester County Court was unanimously affirmed by order of the Appellate Division, Second Judicial Department, dated March 19, 1973. The Court of Appeals thereafter denied application for leave to appeal to that court.

Section 440.10 of the Criminal Procedure Law gives jurisdiction of the instant motion to the court in which the original judgment of conviction was obtained.

[Much of the present motion is based on the theory of the respective defendants that pertinent information was not known to

them or either of them at the time of trial but was later brought to their attention and learned in "1973 and 1974 through news coverage in The New York Times, Daily News and television news programs of Special State Prosecutor Maurice Nadjari's uncovering of corruption, perjury and illegal wiretapping of SIU" [Special Investigating Unit of the New York City Police Department]. Defendants further claim that at the time that they were on trial in the Westchester County Court in 1971 for possession of four kilos of cocaine, that they did not then know that the Chile Lindo Restaurant telephone was tapped, nor did they know "that many SIU detectives had committed crimes and that two years later those same detectives would be federal prisoners". Defendants make reference to illegal wiretaps from June, 1970, through November, 1970, on the telephones at the Chile Lindo Restaurant on 23rd Street in the Borough of Manhattan. It was their acknowledged meeting place for drug transactions. Defendants also make reference to other illegal wiretapping and illegal search and seizures months before the wiretap on James Miller's phone was ever obtained. [Defendants offer no proof whatsoever of any such illegal wiretaps or illegal searches and seizures, and their claims in reference thereto constitute nothing more than bare assertions, allegations and personal conclusions. Bare allegations are not sufficient to raise a triable issue of fact long after sentence has been pronounced.] People v. Wurzler, 280 App. Div. 1020, 116 N Y S 2d 756.

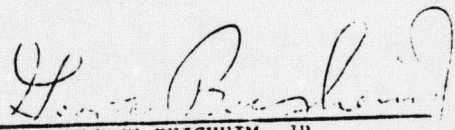
In reference to the alleged illegality of the wiretap on the telephone of James Miller, pursuant to wiretap order of September 3, 1970, signed by Justice Juan A. Sandifer, Supreme Court, New York County, motions previously made challenging the validity of such order were denied by Judge Sullivan of the Westchester County Court before defendants' trial on May 12, 1971. Such ruling

was declared the law of the case and was pursued throughout the trial of the respective defendants herein in the Westchester County Court as same was conducted before the Hon. George Beisheim, Jr.

Other than what has been offered and passed upon before or that which could and probably should have been incorporated in their appeal from the judgment of conviction to the Appellate Division, the defendants now offer nothing new in the way of factual matter to justify a hearing or the setting aside and vacating the judgment of conviction. The defendants may not now seek indirectly to relitigate issues which were previously raised on trial and on appeal and decided adversely to them. People ex rel. Baumgart v. Martin, 214 N Y S 2d 370. News information, no matter how discrediting or scandalous, of the Special Investigating Unit of the New York City Police Department coming to the attention of defendants two to three years after they were convicted and sentenced does not in and of itself justify setting aside the jury verdict convicting defendants. The court does not interpret the subsequent history of the SIU after completion of defendants' trial and conviction as such newly discovered evidence of a character that would have created the probability that the verdict would have been more favorable to the defendants if such evidence had been received at the time of trial. (This assumes that discrediting material against the SIU, even if in existence at the time of defendants' trial, would have been admissible at such trial.) see, section 440.10(g) of the Criminal Procedure Law.

Accordingly, it is the decision and order of this court that defendants' motion is denied in full.

Dated: White Plains, N. Y.
May 21, 1976


GEORGE BEISHEIM, JR.
J.S.C.

HON. CARL A. VERGARI
District Attorney of Westchester County
Courthouse
White Plains, N. Y. 10601

MARTIN HERNANDEZ and VICTOR HERNANDEZ
Pro Se
Drawer B
Stormville, N. Y. 12582

PETITION FOR WRIT OF HABEAS CORPUS,
DATED AUGUST 3, 1976
(pp. 38a to 59a)

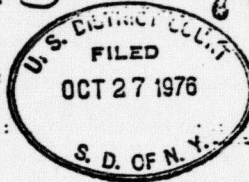
United States District Court
Eastern District of New York

United States of America,
ex rel. Martin Hernandez, and
Victor Hernandez,

Petitioners,:

-against-

Walter Fogg, Superintendent
Green Haven Correctional
Facility, Stormville, New York:
Respondent :



WRIT OF HABEAS CORPUS

Re: 71 Cr. 874

76 CIV. 4747

The United States of America upon the relation of Martin Hernandez and
Victor Hernandez.

Greeting:

To Walter Fogg, Superintendent, Green Haven Correctional Facility, Stormville,
New York.

WE COMMAND YOU, that you have and produce the bodies of Martin Hernandez
and Victor Hernandez, by you imprisoned and detained, as it is said, together
with your full return to this writ and the time and cause of such imprisonment
and detention, by whatsoever names the said persons shall be called or charged
before Hon. Jack B. Weinstein, United States District Judge for the Eastern
District of New York, at the United States Court House, 225 Cadman Plaza East,
Brooklyn, New York, in the Courthouse thereof on the ___ day of ___ 1976 at
10:00 o'clock in the forenoon to do and receive what shall then and there be
considered the said persons and have you then and there this writ.

Witness, Hon. _____ U.S.D.J., the ___ day of ___ 1976

Clerk

Martin Hernandez # 18347

Victor Hernandez # 18348

Drawer B

Stormville, New York 12582

Victor Hernandez, # 18348
Drawer B

Stormville, New York 12582

The within writ is hereby allowed
this ___ day of ___ 1976

U.S.D.J.

Given to before me this

day of ___ 1976

Notary Public

RECORDED IN DISTRICT CLERK'S OFFICE
U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
COMMENCED IN CASE NO. 76-12582

Supreme District of New York
District Court of New York

United States District Court
Eastern District of New York

United States of America, :
ex rel. Martin Hernandez, and :
Victor Hernandez, :
Petitioners, :

-against-

AFFIDAVIT OF POVERTY

Walter Fogg, Superintendent
Green Haven Correctional
Facility, Stormville, New York:
Respondent :

Re: 71 Cr. 574

State of New York) ss:
County of Dutchess)

That the petitioners Martin and Victor Hernandez and petitioners
Martin Hernandez and Victor Hernandez, being duly sworn according to
law, depose and say.

Petitioners are in custody in violation of the Constitution and laws of
the United States, and are imprisoned by the respondent Walter Fogg, Superintendent
of Green Haven Correctional Facility, Stormville, New York.

2. That we are citizens of the United States and are over twenty-one (21)
years of age.

3. That because of poverty we are poor persons within the meaning of, and
pursuant to Title 28 U.S.C. 1915(a) and are without funds or family capable
to defray the cost and fees of prosecuting and perfecting this writ.

4. We sincerely believe that we are entitled to the relief we seek by way of
Federal Habeas Corpus.

5. We therefore declare ourselves poor persons and respectfully request to
proceed in Forma Pauperis and for the assignment of counsel.

That we are poor persons and respectfully request to proceed in Forma Pauperis and for the assignment of counsel.

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That we are poor persons and respectfully request to proceed in Forma Pauperis and for the assignment of counsel.

United States District Court
Eastern District of New York

United States of America, :

ex rel. Martin Hernandez, and

Victor Hernandez.

vs. Respondent :

PETITION FOR WRIT

OF HABEAS CORPUS

Re: 71 Cr. 874

Walter Fogg, Superintendent

Green Haven Correctional

Facility, Stormville, New York:

Respondent :

State of New York) ss: (County of Dutchess)

Sherris, Clerk of the Court.

1975 Comes now, the petitioners Martin and Victor Hernandez and petitions this

Court for a writ of habeas corpus pursuant to 28 U.S.C. 2241(c)(3), and 2254.

Petitioners are in custody in violation of the Constitution and laws of

the United States, and are imprisoned by the respondent Walter Fogg, Superintendent

of Green Haven Correctional Facility, Stormville, New York.

The conviction and sentence pursuant to which petitioners are being detained

was imposed in violation of our fourth, fifth, sixth and fourteenth amendment

rights under the Constitution and Laws of the United States.

Exhaustion of States Remedies

The constitutional issues raised in this petition were not made known to your petitioners at the time of our trial in 1971. It was not until November of 1974, that we began to learn of the illegal wiretaps and the involvement of the arresting officer in our case.

It was further not until October of 1975, that our state Court trial Judge, The Honorable George Beisheim ordered that our trial minutes be loaned to us for the purpose of preparing a post-conviction application. However, unfortunately your petitioners also stood convicted of participating in a federal conspiracy and therefore we were in need of securing our federal trial minutes as well before being able to bring the state post-conviction application.

In January of 1976, the Honorable Jack B. Weinstein, U.S.D.J. and also the Judge who presided over our Federal conspiracy trial ordered that our Federal trial minutes be loaned to us for the purpose of preparing our state post-conviction application, Said application and all other related papers are annexed to this writ, and allowed.

On March 15, 1976 we submitted our post-conviction motion in the Supreme Court of Westchester County[See exhibit A]. On May 7, 1976, Judge Beishain denied our motion without a hearing or allowing your petitioners even 10 days in which to submit a Traverse to the District Attorneys opposition[See exhibit B].

On June __, 1976, petitioners sought leave to appeal to the Appellate Division, Second Judicial Department, and appealed to the Honorable J. James Shapiro, Associate Justice of the Court. Leave to appeal was denied on June 30, 1976. [See exhibit C].

No appeal lies to the New York Court of Appeals from a denial of leave to appeal to an Appellate Division.

Petitioners have exhausted our state remedies within the contemplation of 28 U.S.C. 2254.

Petitioners were indicted for the crime of Criminal Possession of a Dangerous Drug in the First Degree, a Class A felony under New York Law allegedly committed on the 6th day of November, 1970. Trial was had in Supreme Court Westchester County before the Honorable George Beishain, Jr., and a jury on the 24th day of June 1971. The case was submitted to the jury and the jury rendered a verdict of guilty. Thereafter, on the 13th day of September, 1971, defendants were sentenced to terms of twenty-five(25) years to life and twenty(20) years to life, respectively.

To facilitate the preparation of this petition and to avoid any unnecessary opposition from the States Attorney General that we may have changed the issues to be presented in this case[Court], the following are our contentions in toto as presented to the New York State Courts.

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SUMMARY OF THE STATES CASE

The following is a summary of the people's case in order that we may have an understanding of how evidence, testimony and factual issues were neatly discarded, covered up and altered.

On November 6, 1970 defendants Martin Hernandez and Victor Hernandez were arrested with Madeline Pineda (another defendant under this indictment) and Victor Dragon aka Mario Sepulveda, at 709 Watburton Avenue, in the city of Yonkers for possession of four kilos of cocaine, some glass vials and other small quantities of cocaine.

The people presented their case that this seizure of cocaine was but a portion of a larger shipment of cocaine smuggled in from Chile to the United States via ship. They contended that defendants were discovered and illegal activities unveiled, through the use of wiretaps and thereafter surveillance.

To prove their case the people produced as witnesses detectives of the Special Investigating Unit of the New York Police Department's Narcotic Unit. It was testified to that initially on September 3, 1970 a wiretap order was signed by Justice Jaun A. Sandifer, Supreme Court, New York County for interception of James Miller's (aka)-(Pluggie) conversations which were drug related. That through wiretaps on Miller's phone SIU detectives learned that Enrique Hernandez (the brother of defendants herein) was also involved in drug traffic (cocaine) and thereafter obtained a wiretap for Enrique Hernandez's phone.

That through wiretaps on Enrique Hernandez's phone detectives of SIU learned Madeline Pineda was involved in cocaine traffic and a wiretap was obtained for her phone. Tapes were introduced in which detectives of SIU interpreted their conversations as related to drugs. That through these wiretaps the detectives were lead to Martin Hernandez, Victor Hernandez and Victor Dragon.

After defendant's arrest on November 6, 1970, and while incarcerated in the Westchester County Jail, Victor Dragon decided to become a witness for the people. He testified at trial that he was a Chilean, arranged to have the cocaine brought to this country on the S.S. Maipo on November 2, 1970, for the defendants herein and that Madeline Pineda was a go-between for the transactions.

Detectives of SIU testified that through the wiretaps on Pineda's phone they learned that Dragon was bringing the cocaine to Pineda's 709 Warburton Avenue apartment in the morning hours of November 6, 1970. It was also testified to that the crucial conversation of what time your defendants were to pick up the cocaine was not recorded on tape because of a mechanical difficulty, but was heard live by S I U Detectives. . . and illegal search and

Knowing the time of arrival of Dragon with the cocaine, SIU staked out the building, saw Dragon arrive with the cocaine in a shopping bag and watched him enter the eighth floor apartment of Pineda. They further testified that they held their lookout posts and saw defendants arrive and go in Pineda's apartment. That when your defendants departed they were carrying a shopping bag, and SIU made their arrests, while taking defendants back into Pineda's apartment to also arrest her and Dragon. . . SIU, our informants, identities and

Motions challenging the validity of the initial wiretap on Miller's phone which lead to a succession of others were denied by Judge Sullivan on May 12, 1971, and also during the trial by Judge Beisheim. Requests to have all of the original tapes turned over to the defense and not just the piecemeal portions which the People submitted were also denied . . . stated as the only means

STATEMENT OF THE FACTS . . . of information
The following statement of facts will differ to such a degree from what has been previously stated as the People's case which secured our convictions that parenthetical references will be used to note the source of many of these facts. It is to be noted that the following was not known by your defendants or their counsel at the time of our trial in Westchester County and therefore we could not have been expected to present these facts at that time. Thus the following is largely outside of the records . . . testified to in Federal Court . . .

It is now a well known fact that the Special Investigating Unit(SIU) of the New York City Police Department, now defunct, was the most corrupt, law breaking bodies ever to be unleashed under the guise of law enforcement. From the theft of over 112 million dollars worth of French heroin to perjury before grand juries, illegal wiretapping, drug selling and murder. All have been attributed to SIU. Of course to obtain informers and more easily secured convictions many of these detectives have been allowed to plead guilty to lesser crimes. For whatever benefits this may serve in securing convictions against other corrupt detectives, it does not erase the perversions of justice which SIU left in the past.

The Wiretap Order For Miller's
Phone is Used As A Stop-Gap
By SIU Detectives

It will be shown in this affidavit that Martin Hernandez, Victor Hernandez, Madeline Pineda and Victor Dragon were not luckily come upon by the wire-tap of an alleged street level dealer named James Miller which was signed on September 3, 1970, but rather by illegal wiretapping and illegal search and seizure months before the order for Miller's phone was even sought.

It will be shown that detectives of SIU committed perjury when they testified they first saw Madeline Pineda and identified her voice in October, 1970, while walking to a movie with her mother. It will be shown that detectives of SIU committed perjury when they say they recognized Victor Hernandez and his voice while walking past an open phone booth. It will be shown that your defendants were known to SIU, our activities, identities and dwellings long before September 3, 1970, other conversation".

It will be shown that in June of 1970, SIU had placed an illegal wiretap on a bar and restaurant in Manhattan, called the Chile Lindo. That through these illegal wiretaps, surveillance and pictures, defendants activities were uncovered and the Miller legal wiretap order was obtained as the only means in which to stop gap and legitimize what previously were months of information gained by illegal wiretaps. In a sense it is much like the way dirty money is "laundered" to come out looking clean.

II

The Chile Lindo Wiretap

During the months of June 1970 and through November, 1970, a series of illegal wiretaps were recorded on the telephone in the Chile Lindo restaurant on 23rd Street in Manhattan. This was testified to in Federal Court, Eastern District of New York, on November 15, 1974. Hon. Jack B. Weinstein presiding * [FH, p. 6-7] by former detectives Sottile of SIU, now a federal prisoner and government informer. The illegal wiretap was maintained from a listening post at the Atkins Glass Store, 152 West 24th Street, in Manhattan. Surveillance was conducted of all persons who entered and left the Chile Lindo [FH, p. 8], and leads were gotten as to drug trafficking [FH, 12].

*Note: Reference abbreviations [FH] refer to the federal hearing minutes of November 15, 1974. [ST] refers to the State transcripts of the trial in Westchester County in 1971 and [FT] refers to the federal conspiracy trial, held in 1971.

"The lead, you know, we got was just general talk about drug traffic. We suspected drug traffic of the people who frequented there." [FH, 8, 12-13]

Once leads were through illegal wiretaps they were not divulged to prosecutors or defense counsel [FH p. 16]. Thus, we have a situation where clearly it can never be realized if these detectives of SIU are lying or not. Do you recall anything to the effect of...

Defendants had begun to learn in 1973 and 1974, through news coverage in the New York Times, Daily News and Television news programs of Special State Prosecutor Maurice Nadjari's uncovering of corruption, perjury and illegal wiretapping of SIU. We had long suspected that the wiretap tapes in our case were altered and that the Miller wiretap was grounded on lies. Take for instance the testimony of Madeline Pineda of Victor Dragon a/k/a/ Mario Sepulveda who... "It was longer than that...the only conversation that I heard here was part of the conversation with another conversation". [ST p. 1119]

Thus the implication is that the tapes were spliced and whole conversations Q. During the conversation you had when you first met him, to the best of your recollection what did you hear him say? to the best of your recollection.

Nevertheless, the following testimony will establish that Victor Hernandez, A. ...that we should meet on the following day at the Chile Lindo restaurant. Martin Hernandez, Madeline Pineda, Enrique Hernandez, and Victor Dragon used the Chile Lindo as a sort of head-quarters where they could be found and meeting place for drug transactions during the period SIU maintained illegal wiretaps on those premises.

Dragon direct: On November 5, 1970, did there come a time when you went to the Chile Lindo restaurant?

A. Yes [ST, p. 190]

Q. Who was present at that time?

A. That night, there were present Martin (Pee Wee) Hernandez, Victor Hernandez and Madeline Pineda [ST, p. 190]

A. We agreed, and I'm supposed to call her as soon as I have the cocaine in my possession [ST, p. 191]

Dragon cross: ...you met Madeline Pineda on August 31, 1970, at the Chile Lindo; is that correct?

A. Yes sir.

-45a-

Pineda direct: A. I met Mario through his wife in Chile Lindo; that is a restaurant.

Q. Is that commonly called the house of C?

A. Yes. [ST, p. 993]

Q. And do you recall something to the effect of we have near it, or something like 40 suits; what did that refer to?

A. That was another conversation where Imada would talk to Hank when we

were in Chile Lindo....[ST, p. 1023]

Q. And did you all frequent and socialize at this Chilean House?

A. Sometimes, yes. [ST, p. 998]

Then of course there is the testimony of Victor Dragon a/k/a/ Mario Sepulveda who testified for the People in Westchester County and again in the trial held in Federal Court:

Dragon/Sepulveda direct:

Q. During the conversation you had when you first met him, to the best of your recollection what did you say to him and what did he say to you?

A. ...that we should meet on the following day at the Chile Lindo restaurant and then we would talk as to how we were going to get the cocaine off. [FT, p. 384]

Dragon/Sepulveda:

Q. And I believe you stated that Mr. Olate asked you to meet him the next day?

A. Yes, at the restaurant, Chile Lindo.

Q. Now did you meet Mr. Olate at the Chile Lindo?

A. Yes sir.

Q. Where is the Chile Lindo located?

A. The Chile Lindo is located on 23rd Street between Sixth and Seventh Avenues.

Q. Now do you recall the date that you met Nicodemus Olate for the first time in the Chile Lindo?

A. It was on the second day of September, 1970

In June of 1970, Dragon had a conversation in the Chile Lindo with one Eduardo Borrone [FT, p. 389] another co-defendant in defendants conspiracy trial.

Q. Mr. Sepulveda, where did this conversation with Mr. Borrone take place?
A. I had this conversation with Mr. Borrone and another person at the Chile
Lindo Restaurant [FT, p. 391].
Further testimony by Dragon/Sepulveda further reveals that the Chile
Lindo was the meeting spot of your defendants:

Dragon/Sepulveda directs: [The frog man equipment] therefore went to the [Chile Lindo]

Q. Do you recall whether or not you saw Mr. Olate on September 3, 1970?

A. Yes, I saw him sir. [FT, p. 423-425]

Q. Where did you see him? [The witness testified that SIU for some unknown reason on

A. We had agreed to always meet at the Chile Lindo so I met him at the
Chile Lindo. [The witness testified that Dragon had on some night or morning

Q. Did you meet him at a particular time? [The witness testified that]

A. I always went to the Chile Lindo in the afternoon. So after 6:00 o'clock,
he met me there. [FT, p. 395]
[The witness testified that Dragon after going to Mr. Olate's home from Borrone's

Q. Did you say the date that you know the ship, arrived?

A. The ship arrived on the 4th of September. [FT, p. 426]
[The witness testified that Dragon before going to the Chile Lindo and

Q. How do you know that?

A. Well, because on the 4th of September, I had a meeting with Mr. Olate at
the Chile Lindo [FT, p. 396]
[The witness testified that Dragon went to Borrone's home (FT, p. 427) to pick him up and then went to

Q. Calling your attention now to the next day, which is September 5, 1970,
at about nine o'clock in the morning where were you?

A. More or less at the time I arrived at the Chile Lindo Restaurant [FT, p. 420].

A little while later while awaiting at the door (Chile Lindo) Agapito and
Eduardo Borrone arrived.

Q. Did you stay at the Chile Lindo or did you go somewhere else?

A. Once the other two had arrived we proceeded to 42nd Street to purchase
the equipment. [FT, p. 420]

Dragon is referring here to the frog man equipment used to remove the
coastline from the S.S. Maipo. We are almost compelled to assume that the
detectives of SIU who had the Chile Lindo under surveillance would not miss
the opportunity to tail these three individuals who chose to meet at 9:00
o'clock in the morning in front of the hottest drug spot on 23rd Street.

In any event we know SIU had the bar under constant watch and that they
followed all persons who left that bar. If they did follow they would have
been led to:

A. We went to 42nd Street.

Q. And you went into the store with Agapito Gu-Leon and Eduardo Borrone?

A. Yes sir. [FT, p. 421]

Q. And to the best of your recollection what did you buy?

A. We bought a rubber suit...Flippers, the hat, a rubber hat, a tube, and something else...[FT, p. 422]

After purchasing the frog man equipment, the trio went to the apartment of Eduardo Borrone then Dragon went to where he lived. The apartment of Madeline Pineda, 709 Warburton Avenue. [FT, p. 423-425]

Thus it can readily be seen that even if SIU for some unknown reason on this day did not trail Dragon, Agapito and Borrone to purchase the skin diving equipment they surely trailed Dragon home on some night or morning after leaving the Chile Lindo. The evidence clearly supports this:

"Surveillance was conducted of all persons who entered and left the Chile Lindo [Sottile' FH, p. 8]

Moreover, Dragon after going to Madeline Pineda's house from Borrone's asked her if she could drive him to the Brooklyn docks by car. [FT, p. 426]

The car was a maroon 1969 LeMans. But before going to the docks Madeline and Dragon went to Borrone's house [FT, p. 427] to pick him up and then went to see the Chilean ship [FT, p. 427]. By this time it was 3:00 o'clock in the afternoon so they left the pier and went to the Chile Lindo Restaurant together [FT, p. 429]. Thus if SIU lost Dragon before, they surely picked him up again at this point.

Defendants presents the facts in this manner so there can be no mistakes made in how all these cocaine activities centered around the Chile Lindo Restaurant before the legal wiretaps were sought for Miller, Hernandez and Pineda.

On page 420 of the federal transcript that same afternoon, Dragon, Borrone, Olate, Arnaldo and Cestino Valverde left the Chile Lindo Restaurant to go back to the Brooklyn Piers to check out a good spot where the cocaine could be brought in off the ship. Then upon seeing the place, returned to the Chile Lindo Restaurant [FT, p. 431]. Even the most naive person knowing the facts as they are now, would not believe SIU were not on the tails of these individuals.

The next day September 6, 1970, Dragon meets Olate and Quintanilla at Chile Lindo at 6:00 p.m. to go and bring in the cocaine[FT, p. 1133].

Subsequently 21 kilograms of cocaine were removed from the S.S. Maipo by Borrone and Valverde and taken to the home of Celestino Valverde[FT, p. 443].

Defendants would like to make note for clarification of the Court that the aforementioned 21 kilograms brought from the S.S. Maipo September 6, 1970 is not the shipment in which we are convicted of possessing four kilos of cocaine. Our convictions stem from a later shipment on November 2, 1970.

Defendants contend that they were doing business with Madeline Pineda and Victor Dragon since June of 1970[FT, p. 461-462]. It is evident from the quoted portions of the various transcripts that the Chile Lindo was headquarters for our activities. Besides using the telephone there we frequented the bar on a daily basis. At this point we wish to introduce the affidavit of Victor Hernandez as Exhibit A.

1. When I got to the Chile Lindo I met with Madeline Pineda and I told her that the SIU UNLAWFULLY STOPS VICTOR HERNANDEZ IN SEPTEMBER 1970 she answered "Yes, yes."

We have already seen that on the testimony of Martin Hernandez a September 5 shipment of cocaine which came off the S.S. Maipo Victor Hernandez apparently escaped initial detection by SIU because through a mishap in timing the cocaine Borrone and Valverde were thrown off schedule[FT, p.433-443]. Apparently angered by missing this shipment when it first arrived detectives of SIU stopped your defendant Victor Hernandez at 23rd Street and 8th Avenue after leaving the Chile Lindo[see affidavit attached].

While the significance of defendant Victor Hernandez being stopped by SIU in September 1970 had no special meaning to us at the time we were on trial in Westchester in 1971 for possession of 4 kilos of cocaine was because we did not then know the Chile Lindo was tapped. Nor did we know that many SIU detectives had committed crimes and that two years later those same detectives would be federal prisoners.

At this point we continue to show how the Chile Lindo was the central base for these cocaine operations.

On September 8, 1970 Dragon goes to Enrique Hernandez's house to find out about payment for the cocaine[FT, p. 484].

Q. Mr. Sepulveda (Dragon) do you recall where you were during the afternoon of September 11, 1970?

A. Yes sir.

Q. Where?

A. At the Chile Lindo Restaurant. [ET, p. 511]

Defendants now refer at this point to the November 5, shipment of cocaine and show:

Dragon/Sepulveda:

Q. Did there come a time when you left Mr. Olate's apartment?

A. At about 9:30 more or less in the evening, I asked Mr. Olate for the car, since I had to go to an appointment at the Chile Lindo with Mrs. Pineda.

Q. And did you meet anybody there?

A. When I got to the Chile Lindo, inside I met with Madeline Pineda and I told her that the ship was at the dock, to which she answered "Yes, yes, we have already seen it." She was in the company of Martin Hernandez and Victor Hernandez.

Defendants contend that we have used the phone in the Chile Lindo hundreds of times during the months of June through November of 1970. If we wanted Enrique or Madeline we would call. If they wanted us, they would either call from Chile Lindo or call to Chile Lindo.

Enrique Hernandez:

Q. During the months of early September until the middle of November 1970, did you have occasion to talk over the telephone with one James Miller?

A. Yes.

Q. How many occasions?

A. Quite a few occasions.

Q. Did you have occasion to talk over the telephone with your brother,

Martin Hernandez and Victor Hernandez?

A. Quite a few occasions [FH, p. 44-45].

Q. Did you have occasion to talk over the telephone with Madeline Pineda?

A. Yes.

Q. Did you have occasion to talk over the telephone with Mario Sepulveda?

A. Quite a few occasions [FH, p. 45].

Q. Did you have occasion to use the telephones at the Chile Lindo Restaurant?

A. Quite a few times.

Q. Could you tell us when you used their phone and who you talked to?

A. Well, I mostly in around September, I called Madeline Pineda quite a few times. I called my mother and I called James Miller.

Q. On any of the conversations you had with any of these people, was it related to narcotic drugs?

A. Yes. James Miller. [FF, p. 22]

Q. Did you know that the Chile Lindo telephone was tapped?

A. NO. [FF, p. 45-46]

Q. Did you ever use your name when you made these phone calls?

A. Yes.

Q. Did you ever receive any telephone calls at the Chile Lindo Restaurant?

A. Quite a few.

Q. From who?

A. Mario Sepulveda, Madeline Pineda, and Victor and Martin Hernandez, my brothers. [FF, p. 46]

THE INFORMANT ON WHICH
THE MILLER WIRETAP WAS
BASED IS FICTITIOUS

As previously stated the wiretap on James Miller's phone who SIU claims lead them to Enrique Hernandez, Madeline Pineda, Martin Hernandez, Victor Hernandez and Victor Dragon/Sepulveda was predicated upon a wiretap order which was signed on September 3, 1970, by Justice Jaun A. Sandifer, Supreme Court, New York County.

Judge Sullivan on May 12, 1971, denied a motion made in Westchester County, made by defendants to challenge the legality of the Miller Wiretap.

Justice George Beisheim, Jr., during our trial in Westchester County, repeatedly denied motions to challenge the Miller wiretap ruling that Judge Sullivan's ruling was the law of the case. However, the information and evidence which we now submit in this affidavit was not available to us at the time of trial and in fact we had no knowledge of the information stated herein.

James Miller was a co-defendant along with your defendants herein during our Federal conspiracy trial. Miller's attorney Mr. Emanuel Paverstein made a motion as follows:

Mr. Paverstein: Yes, sir, I have the same motion as Mr. Larva (defendants)-
counsel). I would like a hearing, your Honor, to determine if in fact the
eavesdropping warrants were legally instituted in the first instance as
against my client James Miller. [FT, p. 22]

Mr. Paverstein: Well, Judge, I would more or less— I am claiming that in
fact this informant is fictitious and does not exist.

It was testified to by detective Broder and Crust of SIU that an un-
identified informant met Det. Broder by chance and said he wanted to talk to
him. The informant said James Miller was selling drugs on August 20, 1970 at
6:00 p.m. Broder and Crust arranged for the informant to call Miller's
apartment on a telephone in Harlem Hospital. Broder claims he shared the
earphone with the informant, and that Miller engaged in a general drug
conversation discussing price and quality of "H" meaning heroin. [FT, pgs.
23-38].

In order to secure the initial wiretap for Miller's phone Broder and
Crust also related to the Court that they observed three drug dealers enter
Miller's apartment while they conducted surveillance. In Federal Court Mr.
Paverstein brought out the truth to this:

Broder direct by Mr. Paverstein:

Q. Now, you stated in your affidavit, paragraph 10, officer, that "three
known medium scale dealers" entered and left apartment 8-J at separate
intervals from 4:00 p.m. to 8:00 p.m., is that correct?

A. That's correct.

Q. Do you know the names of these three particular individuals?

A. No.

Q. Were you ever in Court when they were convicted of any possession of
drugs or any other crime?

A. No.

Q. Did your partner, at the time, Detective Crust— did he inform you of
anything relating to the medium scale sellers?

A. Yes.

Q. And it was based on what he told you that you put down in the affidavit
that these are three known medium scale sellers, or were they known to
you?

A. Known to him. [FT, pgs. 52-53].

As can be seen from the above Detective Brodner in submitting the affidavit for Miller's wiretap was not personally aware of these three medium scale dealers who were supposed to be seen entering Miller's apartment. Here is what Detective Crust had to say:

Crust direct by Mr. Paverstein:

Q. Now, do you know the names of the three people in the affidavit that are known as medium scale dealers? Do you know their names?

A. No, I do not.

Q. Have you ever placed them under arrest?

A. No I did not.

Q. Were you ever present in Court when they were convicted of any crime?

A. No, I was not. [FT, p. 63]

Thereafter from pages 64 to 71 Crust tries to explain how in 1966 when he

was working undercover someone told him that one of the persons who he saw enter Miller's apartment in 1970 was a drug dealer.

Q. Someone who you don't remember now told you that he dealt in drugs?

A. That is correct.

Mr. Paverstein urged Judge Weinstein in federal court that "the only

thing we have to go by is the credibility of an officer making out an affidavit."

However, the Court denied the motion and excepted the testimony of officers

Brodner and Crust as truth.

Again your defendants cannot stress too hard that Judge Weinstein's

ruling like Judge Beisheim's and Judge Sullivan's and Judge Sandifer's were

all made before any knowledge of the wrong doing of SIU was discovered and

the contents of this instant affidavit were made known.

Lastly, defendants would like to point out that of all the large quantities

of cocaine which were shown to have been brought to the United States from

Chile, only two actual seizures were brought to light by SIU.

One seizure involved the four kilos for which defendants stand convicted

of possessing at 709 Warburton Avenue in Yonkers, New York, on November 6,

1970.

The other involved one Gilberto Pasqual who was also charged with receiving

a quantity of cocaine from the same shipment your defendants cocaine was alleged

to have come from. SIU Detective Sottile testified that as the result of

information given to him by a confidential informant he learned that

(Gilberto Pasqual) "there was a man, a Cuban, about 5'4" weighing 130 lbs., round faced, dark haired man living in Room 1717 of the Century Paramount Hotel at 235 West 46th Street." [FT, p. 202] Sottile further testified that the informant "told me that, that man is involved in narcotics." [FT, p. 203].

Sottile after going to the Century Paramount Hotel at 46th Street and 8th Avenue on September 10, 1970, found Pasqual in the bar of the hotel and struck up a conversation with him, watched him and then saw Nicodemus Olate and Fusto Quintinilla arrive in a 69 Ford maroon sedan. This is of course the same car which Madeline Pineda drove Dragon to the Brooklyn docks in and later back to the Chile Lindo as previously mentioned in this affidavit. In fact, Detective Sottile testified that:

Sottile: "I immediately recognized the car as a car that I had seen on previous occasions, a car which, in fact, I had followed on previous occasions." [FT, p. 205]

Sottile then later testified that Pasqual got in the car at 46th and 8th Avenue with Olate and Quintinilla, drove around the block and returned and parked in front of the hotel. Sottile testified he saw a brown envelope on the front seat which was torn at the corner and revealed cocaine to him. He then arrested Pasqual, Olate and Quintinilla.

Of the utmost importance to all this is the fact that Sottile testified that he came upon Pasqual as a result of a confidential informant not because of a Chile Lindo wiretap.

Q. Would that include wiretaps too?

A. No. [FT, p. 235]

Which is of course a lie!

The following is the testimony of former Detective Sottile, now a federal prisoner, concerning the Pasqual, Olate, Quintinilla arrest:

Sottile:

Q. Did you conduct an investigation where a Mr. Olate and Mr. Quintinilla were suspects?

A. Yes. [FH, p. 5]

Q. Did they frequent the Chile Lindo Restaurant?

A. I had seen them there, yes.

Q. Did you have an illegal wiretap at any time on the Chile Lindo between June and October of 1970?

A. Yes. [FH, p. 6-7]

Q. Did the illegal wiretap surmise you and Quintinilla?

A. Only to the extent the wiretap provided information on a certain room number in the Century Paramount Hotel; information that that person who later was determined to be Gilberto Pasqual was involved in narcotics trafficking [FH, p. 11-12]

Q. At any time did you divulge to the Assistant U.S. Attorney or to any defense counsel that there were/was an illegal wiretap present during the course of your surveillance and investigation of those defendants?

A. No. [FH, p. 16]

Q. Besides the officers you mentioned, what other officers were aware of the existence of this illegal wiretap?

A. Lieutenant Egan. [FH, p. 16-17]. Sottile in a purging epithet to Judge Weinstein said:

"Your Honor, with respect to the fact that I originally went to the Century Paramount as a result of what an informant told me, I lied." [FH, p. 31]

CONCLUSION

Your defendants contend that former SIU detectives, Egan, Sottile, Crust, Brodner and others were all working together as a whole in their illegal wire-tapping activities and illegal searches. This is supported by the evidence addressed in this affidavit and what will be presented in the Court.

The individuals who perpetrated the illegal information gathering will not readily incriminate themselves by admitting their guilt and District Attorneys will not readily encourage them to do so in order to save their already secured convictions.

There will also be greater opposition against our presentation of the claims herein due to the fact fliers were put out by the district attorneys office of Westchester County quoting the newspapers when Mr. Vergari ran for office. He cited our conviction as a reason why he should be re-elected. We sincerely hope that our plight in presenting the issues herein will not be hampered by any unfair and overzealousness which the district attorney's office of this county has shown in the past.

Defendants contend that a hearing must be held where the confidential informant be produced not just an undercover member stating that an unknown person exists.

That all tape recordings be produced(original) and turned over to the defendants for the purpose of this hearing.

that upon setting a date for hearing we may retain counsel in our behalf.

We further contend that the rationale of UNITED STATES v. ANDOLSCHEK 142 F. 2d 503, 506 (2nd Cir. 1944) cited with approval in Dennis v. United States, 384 U.S. 53 (1967), dictates that unless the government is willing to open its files to the extent necessary to insure, through adversary procedures in open court that its unlawful conduct did not produce leads which contributed to defendants convictions, the case must be reversed. [See Jencks v. United States, 353 U.S. at 670, 672].

Moreover, the claim that investigative files reflecting lawful techniques should be kept free from scrutiny would be more graciously received if experience showed that the government consistently and carefully separated illegally gathered material from the legally gathered, to permit easy identification of the source of any given communication or item of intelligence. Defendants refer also to the revelations of the Ellsberg and Watergate cases not to mention the corruption that Special State's Prosecutor Maurice Nadjari uncovered in SIU.

The State must not be able to insulate itself with labels as "national security" or "confidential informant."

A FEDERAL HABEAS CORPUS HEARING
MUST BE ACCORDED TO PETITIONERS

As can be seen, the serious Constitutional issues aforementioned in this petition require that a full and fair hearing be held, so that an impartial determination of the issues be resolved. That is something the State Courts of New York did not give your petitioners.

We now refer to Judge Beisheims summary denied of our state motion [Exhibit B]. That denial is based on three erroneous statements which are that:

- (a) defendants based their allegations on selected newspaper items [see pg. 2]
- (b) defendants resurrect the same specious allegations raised on direct appeal [see pg. 3]
- (c) No explanation is given by the defendants for their failure to present this information at a earlier date [see pg. 4]

Interestingly Judge Beisheims Third reason for denial (c) is in direct and illogical conflict with reason (b). And as far as reason (a) is concerned petitioners respectively submit that not one of our allegations is even based in part or in whole on any newspaper reports.

In seeking leave to appeal to the Appellate Division, Second Department, we stated:

1

"...your defendants were deprived of a fair and impartial evaluation of their post-conviction motion because Judge Beisheim rendered his decision in the matter before he received our Traverse to the District Attorney's opposition..."

[Application for leave to appeal, Exhibit-(c) pg. 1-2].

Petitioners went on to say:

"Of even greater significance is the fact that our Traverse factually contradicts everything the District Attorney based his opposition on and that which Judge Beisheim based his decision on."

[Application for leave to appeal, Exhibit-(c) pg. 3].

Moreover, your petitioners Traverse specifically stated that:

"All evidence which suggests our claims come from (4) sources. They are:

- (a) State trial minutes
- (b) Federal trial minutes
- (c) Federal hearing of November 15, 1974.
- (d) defendants affidavits and testimony."

We rely on no newspaper accounts or "selected news articles and our petition speaks for itself."

[Traverse at pg. 2]. Exhibit-(d)

CONCLUSION

Realistically, this is petitioners last hope in being able to present our Constitutional contentions in a forum that will provide us with a full and fair hearing on the issues presented herein. We think we deserve the right to show that due to an illegal wiretap and the conduct of Detectives Egan and Gruet the writ should issue. For the illegalities present here have a full bearing on sentences that will effect us for the rest of our lives. Harsh sentences we believe for a non-violent crime, the possession of cocaine, the non-addictive stimulant.

A Court or Judge of the United States does not have the exclusive jurisdiction to order the release of petitioners.

No previous application has been made for the relief requested herein, in Federal Court.

Because of the foregoing facts, petitioners are being restrained of their liberty by the respondent in violation of the Constitution of the United States, and we therefore pray that the writ be granted and an order be entered discharging us from custody.

[illegible]

There is someone in the neighborhood of Mr. Westerg, a well known

Respectfully submitted,

Martin Hernandez
Martin Hernandez, # 18347
Victor Hernandez
Victor Hernandez, # 18348
Drawer B
Stormville, New York 12582

There are two gentlemen who were dressed in street clothes, and they were walking in the same direction as the other two. They are Detective Grant and Detective Ryan. I have known them since I was a child, my brother Martin, Malcolm Binns and I used to go to the movies with them at 709 Westburn Avenue. Since that time I have known them, but have not personally seen Ryan and Grant by arrest.

Sworn to before me this

3 day of Dec. 1976

Francis L. Smith

Notary Public

EDMOND W. GIFFORD, JR.
Notary Public, State of New York
Qualifies on _____
Commission Expires March 30, 1972

AFFIDAVIT

State of New York) ss.:
County of Dutchess)

Victor Hernandez, being duly sworn according to law, deposes and says:

That a few days after September 6, 1970, when Mario(Dragon) brought more cocaine, I was stopped on 23rd Street and 8th Avenue. I had just left the Chile Lindo Restaurant because I was looking for Mario to give him \$16,000.00 which I had in a paper bag with me.

When I stopped for the light in my blue Mustang, a yellow Checker Cab pulled up alongside me and five people jumped out with drawn guns saying they were policemen. They ordered me out of the car and searched it. I am sure they saw and looked into the paper bag on the seat of my car while searching. But they did not take or mention the money to me.

Afterwards, they told me to go ahead because they had the wrong information. Of these five policemen who were dressed in street clothes, I remember seeing two of them again. They are Detective Crust and Detective Egan. I saw them both when they arrested me, my brother Martin, Madeline Pineda and Victor Dragon on November 6, 1970, at 709 Warturton Avenue. Since that time I have seen Crust in Court, but have not personally seen Egan again since my arrest.

in [1] copy to [redacted]

Victor Hernandez
Victor Hernandez, # 18348
Drawer B
Stormville, New York 12582

Sworn to before me this

3 day of January, 1976.

Emmons W. Gifford, Jr.
Notary Public

EMMONS W. GIFFORD, JR.
Notary Public, State of New York
Commission Expires March 18, 1977

MINUTES OF HEARING HELD BEFORE WEINSTEIN, J., IN THE
US DISTRICT COURT, EASTERN DISTRICT, ON NOVEMBER 11,
1974, re USA v. ENRIQUE HERNANDEZ

(pp. 60a to 114a)

FILED
IN CLERK'S OFFICE
DISTRICT COURT E.D. N.Y.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOV 20 1974

UNITED STATES OF AMERICA

against

ENRIQUE HERNANDEZ

71 CR 874

Defendant:

United States Courthouse
Brooklyn, New York

November 15, 1974
2:00 p.m.

Before

HONORABLE JACK B. WEINSTEIN

U. S. D. J.

I hereby certify that the foregoing is a
true and correct transcript of the sten-
ographic notes in this proceeding.

Official Court Reporter
U.S. District Court for the
Eastern District of N.Y.

SHELDON SILVERMAN
Acting Official Court Reporter

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Appearances:

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: CHARLES CLAYMAN, Esq.
Assistant United States Attorney

JOSEPH STONE, Esq.
Attorney for Defendant.

1 THE CLERK: Criminal cause for hearing,
2 U.S.A. versus Enrique Hernandez.

3 THE COURT: How are you feeling, Mr. Hernandez?

4 THE DEFENDANT: Fine, your Honor, thank you.

5 THE COURT: Is your family all right?

6 THE DEFENDANT: Not quite.

7 THE COURT: No?

8 THE DEFENDANT: It's hard on them.

9 THE COURT: Yes, it is.

10 THE COURT: Do you want to produce your
11 witnesses. This is a hearing.

12 MR. STONE: The Government gave me a memoran-
13 dum about twenty minutes ago that I also gave to you.

14 I was under the impression that that issue
15 had already been decided, whether we were entitled to
16 a hearing or not.

17 THE COURT: I'll give you a hearing.

18 MR. CLAYMAN: Could the Government be heard?

19 THE COURT: Yes.

20 MR. CLAYMAN: I gave the memo to the Court
21 last night, but not to repeat what's in it, but
22 Mr. Hernandez brought a series of claims to the Court
23 and he's entitled to discover evidence, but that
24 simply isn't the case.

25 He claims -- he makes a sweeping, amorphous

1 conclusory language that deals in vague generalities,
2 and the corruption in SIU, Special Investigation
3 Unit, illegal wire taps of a Detective Sottile
4 spilled over to his case. He hasn't offered an iota
5 of proof.

6 THE COURT: Let him produce the witnesses
7 and go ahead.

8 MR. CLAYMAN: I received a letter from Mr.
9 Stone whereby he asks not only for the officers who
10 testified in the hearing, not only in the trial --
11 not only for Mr. Sottile, but also Mr. Luci,
12 Mr. Nuveou -- these are police officers who had
13 nothing to do with the trial. These are police offi-
14 cers, as I'm sure the Court is aware, who are cooperat-
15 ing with the Government.

16 Before the Government will produce those
17 witnesses, we'll ask for an offer of proof as to
18 exactly what they're going to prove on the very
19 narrow issue of newly discovered evidence.

20 THE COURT: Have you interviewed them?

21 MR. STONE: They're unavailable to me.
22 They're in safekeeping. The Government has made no
23 bones about that. I ask they be produced under the
24 exclusive right of the Government.

25 THE COURT: Let's hear who you have first to

5
1 see if there's anything to this.

2 MR. STONE: I would like to call Detective
3 Sottile first.

4 THE COURT: Did this go up on appeal?

5 MR. CLAYMAN: Yes.

6 THE COURT: Let me have copies of the briefs
7 so it would refresh my recollection. It was tried
8 some time ago, wasn't it?

9
10 JAMES SOTTILE, called as a witness, being
11 first duly sworn by the Clerk of the Court, testified
12 as follows:

13 THE CLERK: Full name please, and spell your
14 last name for the record.

15 THE WITNESS: James Sottile, S-o-t-t-i-l-e.

16 DIRECT EXAMINATION

17 BY MR. STONE:

18 Q Mr. Sottile, are you still a police officer?

19 A No, sir.

20 Q Were you a police officer attached to the
21 Special Investigation Unit in 1970?

22 A Yes, sir.

23 Q Did you conduct an investigation where a
24 Mr. Olate-Romero and Mr. Quintanilla were suspects?

25 A Yes.

1
2 Q Did they frequent the Chile-Lindo Restaurant?

3 A I had seen them there, yes.

4 Q Do you know where that restaurant is?

5 A West 23 Street.

6 Q In Manhattan?

7 A Yes.

8 Q Did you testify in the case of United States
9 versus Joseph Nuveou in the Southern District of New York?

10 A Yes.

11 Q During your testimony in that case, did you
12 state that you maintained a series of illegal wire taps?

13 A Yes.

14 Q Did you specifically state that one of the
15 persons who was the target of your illegal wire tap was
16 Quintanilla and Olate-Romero?

17 A Yes.

18 Q Mr. Sottile, how many illegal wire taps did you
19 participate in from June 1970 through November 1970?

20 MR. CLAYMAN: I object, your Honor.

21 THE COURT: Sustained. Let's get to the issue.

22 here.

23 Q Did you have an illegal wire tap at any time
24 on the Chile-Lindo Restaurant between June and October of
25 1970?

1
2 A Yes.

3 Q Was that particular wire tap maintained --
4 was the listening post at the Atkins Glass Store, 152 West
5 24th Street, Manhattan?

6 A Yes.

7 Q When was that illegal wire tap put in?

8 A In the beginning of September.

9 Q Of 1970.

10 A Yes.

11 Q When was it terminated?

12 A It was terminated in October and again started
13 up for a short time, I believe, in November.

14 THE COURT: What year?

15 THE WITNESS: Finally terminated in November
16 of 1970.

17 THE COURT: 1970?

18 THE WITNESS: Yes, your Honor.

19 THE COURT: When was it started?

20 THE WITNESS: Early September ; the first week
21 in September.

22 Q Was that a telephone tap on the phones in the
23 Chile-Lindo Restaurant?

24 A The phone, yes.

25 Q One phone? yes.

1
2 A Yes.

3 Q Was that the only illegal tap that was at
4 the Atkins Glass store listening post?

5 MR. CLAYMAN: Objection.

6 THE COURT: Why do you need more?

7 MR. STONE: I want to know if there was another
8 one from that listening post. We have evidence to
9 develop they used that as a listening post.

10 THE COURT: Go ahead.

11 Q Were there any other illegal taps where the
12 Atkins Glass store was a listening post at that time?

13 A No.

14 Q Who monitored those calls?

15 A Detective Aguiluz in the beginning. Later on
16 Detectives Riviera and Martinez and Detective Nuñez.

17 Q In between the monitoring of these illegal
18 taps, did you also conduct surveillance with certain persons
19 as suspects?

20 A We conducted surveillance of the Chile-Lindo
21 and all persons who entered or left the Chile-Lindo.

22 Q Did you see Enrique Hernandez enter or leave
23 the Chile-Lindo at any time?

24 A No.

25 Q Did you keep any notes on the illegal wire tap?

Sottile-direct

9

A No. There may have been notes at that time, but we didn't keep them.

Q Were these illegal wire taps recorded?

A No.

Q They were --

A Not on paper. They were recorded on tapes, yes.

Q That's what I mean.

A Yes.

Q Do you know where those tapes are presently?

A No, we destroyed them.

Q When were they destroyed?

A It's hard to say. The procedure was to destroy them shortly after we -- we didn't keep them around very long. We re-used them.

Q Did you conduct or hear any voice of Mario Sepulveda on those tapes?

A Yes. I have to state I don't speak Spanish.

Q Was Detective Martinez your Spanish-speaking officer at that time?

A No, at this time it was Detective Aguiluz and Detective Nuveou, only those two detectives.

Q They both speak Spanish, is that correct?

A Up until the arrest of Olate.

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Q Then after that, who was the Spanish --

A Later on, the interpreters were Aguiluz,
Martinez, and Rivera.

Q Did you ever hear the voice of Madelaine
Pineda?

A No.

Q You're sure of that?

A Let me say that -- Oh, well, I heard voices
in Spanish at that time, and at this time I could never
tell you who was on that particular line because I wasn't
the interpreter. My information was taken from the detec-
tives who were doing the interpreting for me.

Q Did they ever give you the name of Madelaine
Pineda at any time during the existence of these illegal
taps?

A No.

Q Did they ever give you the name of Enrique
Hernandez?

A No.

Q Did they ever give you the name of Mario
Sepulveda?

A No.

Q Did they ever give you the name of Pee-wee
Hernandez?

1
2 A No.

3 Q Ever give you the name of Victor Hernandez?

4 A No.

5 Q Did they ever give you the name of James
6 Miller?

7 A No.

8 Q Ever the name of Pluggie?

9 A No.

10 Q Tell us what names you overheard on that tape.

11 MR. CLAYMAN: Objection.

12 THE COURT: Sustained.

13 Q After tapping that phone, did you have occasion
14 to follow Olate and Quintanilla?

15 A Yes.

16 Q Did you make an arrest based on what you over-
17 heard on that phone?

18 A No, not really, no.

19 Q Did the illegal wire tap furnish you any
20 leads concerning the arrest of Olate and Quintanilla?

21 MR. CLAYMAN: I would object to the form of
22 the question, your Honor.

23 THE COURT: I will allow it.

24 A Only to the extent the wire tap provided
25 information on a certain room number in the Century Paramount

1
2 Hotel; information that that person who later was deter-
3 mined to be Gilberto Pasquale was involved in narcotics
4 trafficking. At that time I didn't even know that it would
5 be with Olate and Quintantilla. The following of Olate
6 and Quintantilla was the day prior to their arrest.

7 Q You overheard -- Did you overhear them
8 making arrangements to meet on the illegal wire tap?

9 A No.

10 Q What did you overhear in the illegal wire tap
11 concerning them?

12 A Nothing, concerning Olate and Quintanilla,
13 nothing.

14 Q Did you ever get any leads out of Chile-Lindo
15 concerning drug trafficking?

16 A Yes.

17 Q What leads did you get --

18 MR. CLAYMAN: Objection.

19 THE COURT: I'll allow a little fishing around.
20 Go ahead. You may answer it.

21 A Well, the leads were after the Olate and
22 Quintanilla arrest. Do you want --

23 THE COURT: No, just from the wire tap.

24 A The lead, you know, we got was just general
25 talk about drug traffic. We suspected drug traffic of the

people who frequented there. There was no lead that brought us someplace where we, you know, made a seizure or got onto anyone else up until that time.

Q I mean after that time, did you get any names of people from the illegal wire tap?

A Yes.

Q What names, whose names did you get?

MR. CLAYMAN: Objection, again, your Honor.

THE COURT: What names are related to this case?

MR. STONE: I gave five of them.

THE COURT: Any others?

MR. STONE: I don't know the other defendants.

THE COURT: Give him the names. It was a rather full discussion and hearing on the source of the wire tap. Was the source the Chile-Lindo material?

MR. CLAYMAN: The Government's brief would point out sections in the record where the Court itself, after allowing defense attorneys to cross-examine Detective Brodeur, there was an allegation by one of the attorneys that the informant was fictitious. They went into -- cross-examined Brodeur to a great extent and then the Court stated that at this time pursuant to Rule 510, Subdivision

1
2 C, paragraph 3 -- on page 72 of the transcript of
3 the revised draft of the proposed rules of evidence:
4 "I'll see both of these witnesses." being Brodeur,
5 the affiant of the wire testimony as to the informant.
6 "I'll see both these witnesses in chambers without
7 the presence of either counsel. I'll examine them
8 myself. Have them come in now one at a time. We'll
9 take a fifteen-minute recess."

10 The Court comes out. "Gentlemen, these
11 records will be sealed. The records of the in camera
12 investigation will be sealed. Is there anything
13 further?"

14 The Court found there was sufficient basis,
15 based on the examination of the detectives and the
16 sealed record the Court took as to the legitimacy
17 of the informant. There was never any statement,
18 any examination that any leads from the Chile-Lindo
19 are from investigation which Detective Sottile --
20 not part of the team that worked on their case.

21 THE COURT: I don't remember what was in the
22 record. Do you want me to look at it?

23 MR. STONE: I don't remember either.

24 MR. CLAYMAN: It was sealed. You wouldn't
25 remember.

1
2 THE COURT: I saw it. I just don't have any
3 clear recollection.

4 MR. CLAYMAN: I would ask if the Court deems
5 it necessary to --

6 THE COURT: We'll have to get the sealed
7 record in this case.

8 Q Mr. Sottile, I show you the indictment, 71-CR-
9 874, and ask you if you will read that, including the list
10 of co-conspirators, and ask you if any of those names are
11 familiar or divulged to you pursuant to the illegal wire tap.

12 A None of them, absolutely none of them, were
13 divulged.

14 Q Did you ever hear of these names on the illegal
15 wire tap?

16 A None of them.

17 Q Celestino Valverde?

18 A No.

19 Q Did you eventually arrest Mr. Quintanilla and
20 Mr. Romero?

21 A Yes.

22 Q Was there a seizure of narcotics as a result
23 of their arrest?

24 A Yes.

25 Q Was there a hearing to suppress on that

1 seizure of narcotics?

2
3 A In federal court?

4 Q Federal or state court.

5 A It was a hearing in the state court; however,
6 Olate and Quintanilla weren't there. It was on Pasquale.
7 He jumped bail before the end of the hearing.

8 Q Was there a narcotic evidence seized that was
9 introduced in this federal trial, 71-CR-874?

10 A In the trial of the People you just showed me?

11 Q Yes.

12 A Yes.

13 Q Was that the narcotics that you seized in
14 connection with the arrest of Romero and Quintanilla and Pas-
15 quale?

16 A Yes.

17 Q At any time did you divulge to the Assistant
18 United States Attorney or to any defense counsel that there
19 was an illegal wire tap present during the course of your
20 surveillance and investigation of those defendants?

21 A No.

22 Q Besides the officers that you mentioned, what
23 other officers were aware of the existence of this illegal
24 wire tap?

25 MR. CLAYMAN: Objection, your Honor.

THE COURT: I'll allow it. If you can recall.

A Lieutenant Egan. I mentioned Daly. In addition to the others I have already mentioned?

Q Yes.

A I think it's just Lieutenants Egan and Daly, Detective Daly.

Q Was Lieutenant Egan at that time your superior officer?

MR. CLAYMAN: Objection. The Government does want to prevent a fishing expedition.

MR. STONE: Limited and pointing.

THE COURT: A limited fishing can't be avoided. I'm going to permit it.

A Yes.

Q Do you know or did you know in October and November of 1970 Police Officer Owen Brodeur?

A At that time I believe I knew his name but I didn't know him.

Q Did you know Officer Cruet?

A I never really met them until, you know, came down here to give testimony on this case.

Q Was Lieutenant Egan also their superior officer?

A I don't know. He was the commanding officer in late 1970. He was the only commanding officer, so he

would also have to be their commanding officer, also.

Q I see. Is it fair to say that the commanding officer of the Special Investigation Unit would be aware of all the wire taps that his office was maintaining?

A I wasn't privy to what he was aware of and not aware of. He was aware of my wire tap and never had any discussions with him about what, you know, he would know about other teams and what they were doing.

Q Detective Rogers?

A I don't think I knew Rogers at all. Even by name.

Q Did you know a Hugy Pineda?

A No.

Q Did you ever hear his name over the telephone?

A No.

Q Did you let Lieutenant Egan listen to any of these tapes?

A No. Let me clarify that. I don't recall him but once ever going into that actual premise. We met him in the area. He only once went in there that I recall.

Q Is it fair to state then that all the taps on that phone were probably in Spanish or all the conversations?

A Yes.

1
2 Q Who would be -- When you say Aguiluz, Nuveou
3 and --

4 A Up until the time of the arrest, Olate,
5 Martinez was not there, had nothing to do with this thing.
6 It was only myself, Aguiluz, and Nuveou. Aguiluz did most
7 of the interpreting. Nuveou did less of it because he
8 didn't have as intimate knowledge of Spanish as Aguiluz did.

9 Q So the names I mentioned to you, you might
10 not even have remembered if they were in Spanish; is that
11 correct?

12 A I didn't listen to the tapes. There was no
13 point. I wouldn't know what they were talking about.
14 I wouldn't recognize the name on the tape.

15 Q Did you ever follow anybody after listening
16 to a conversation in the Chile-Lindo?

17 A Yes.

18 Q Who did you follow?

19 A Many of the people who were there. I don't
20 know them all by name.

21 Q You would hear a conversation You would then
22 follow someone if you thought it was drug related until
23 you could see what they were doing; is that correct?

24 MR. CLAYMAN: Objection.

25 THE COURT: I'll allow it.

1
2 A Yes. This happened at times, yes.

3 Q It happened from June until October of 1970?

4 MR. CLAYMAN: Objection. That wasn't the
5 testimony.

6 Q What were the dates?

7 A The first week in September until sometime
8 in November, with interruptions of inactivity in between.

9 THE COURT: I have now delivered to me the
10 transcript, sealed, 71-CR-874, by my order on 12/3/1971.
11 Any objection to my unsealing it?

12 MR. CLAYMAN: No.

13 MR. STONE: No.

14 THE COURT: I have re-examined these sealed
15 minutes. I don't see that there's any reason to
16 keep them sealed any more. The case has long since
17 been over.

18 MR. CLAYMAN: Except, your Honor. If there
19 are any names mentioned.

20 THE COURT: No names mentioned. It does
21 indicate that it didn't come from the wire tap.

22 Mark the sealed record as Court Exhibit 1.

23 I have an original and two copies. I'll
24 give you each a copy.

25 (Documents handed to counsel.)

Sottile-direct

21

THE COURT: And the original is marked as
a Court exhibit at this hearing.

THE CLERK: So marked, as Court Exhibit 1.
(So marked)

THE COURT: We don't need the envelope any
longer in which it was sealed. No objection having
been indicated --

MR. STONE: No, your Honor.

MR. CLAYMAN: No.

THE COURT: Where are you now?

THE WITNESS: Unemployed.

Q Mr. Sottile, did you ever hear the name S.S.
MAIPO over the illegal wire tap?

A No.

Q You're sure of that?

A Yes.

Q Did you ever hear any reference to any ship
over the illegal wire tap?

A There were many seamen who frequented the Chile
Lindo and I know of conversations that were related to me
wherein seamen would talk about ships, although it was
common for them, you know, to talk about it. Many of the
frequenters were Chilean seamen.

Q Did you hear any conversations about any of

1
2 the -- were these Chilean seamen, where they were talking
3 about swimming and getting something from the boats, the
4 ships?

5 A I don't recall any conversation.

6 Q On the fourth day of September of 1970, did
7 Romero, Quintanilla, Borrone-Iglar, Mario Sepulveda, and
8 Celestino Valverde or any combination of those names have a
9 conversation that you overheard on the illegal wire tap?

10 A No.

11 Q You're sure of that?

12 A As I said, I didn't listen to the wire taps
13 because I didn't know. There was Spanish, but there was
14 no conversations about any of these people. It was only by
15 the photographs I had taken that I learned their names,
16 years later.

17 Q Did anyone -- Did you ever hear anybody men-
18 tion any particular quantity of cocaine or narcotics over
19 the illegal wiretap?

20 A At one time in late November there was.

21 Q Approximately what day in late November, do
22 you know?

23 A No. It was with another case.

24 Q Do you know the names of people connected
25 with the other case?

1
2 MR. CLAYMAN: Objection.

3 THE COURT: I'll allow it.

4 If you remember.

5 A Larida Castilla and Raol Alacalde.

6 Q You testified at the trial in this matter,
7 did you not, that you took certain photographs?

8 A Yes.

9 Q Did you ever take a photograph of the Chile-
10 Lindo of Mario Sepulveda?

11 A Yes.

12 Q Did you ever take a photograph of the Chile-
13 Lino of Hugo Pineda?

14 A I'm not sure.

15 Q Did you ever take a photograph of the Chile-
16 Lindo of Madelaine Pineda?

17 A Just offhand, I don't recall those two names.
18 no.

19 Q How about Amada Ramirez?

20 A I would have to refresh my memory. I took
21 photographs of a lot of people at the Chile-Lindo who were
22 later identified by Mario Sepulveda and others, you know.
23 at the time I didn't know who these people were.

24 Q I see. When you took these photographs, did
25 you take these photographs after you had listened to the

1
2 conversations on the illegal wiretap?

3 A No, it was during. It was from two separate
4 locations.

5 Q I'm saying you had an illegal wiretap and you
6 overheard conversations; is that correct?

7 A Yes.

8 Q After you overheard the wire taps and the
9 conversations, you became suspicious of certain activities
10 taking place in the Chile-Lindo; is that correct?

11 MR. CLAYMAN: Objection, your Honor.

12 THE COURT: Overruled.

13 A Yes.

14 Q And then you took the photographs; is that
15 correct?

16 A No.

17 Q When did you take the photographs in relation-
18 ship to the listening of the conversation?

19 A That's difficult for me to recall because
20 I took all the photographs and I took them from across the
21 street from the Chile-Lindo. It's quite possible at that
22 time that we didn't even have the illegal wiretap in yet.
23 Because the photographs were just a general intelligence
24 type of information so that we could have other people look
25 at them and try to determine who, you know, if anyone

1 would be involved and I'm not quite sure that we had the
2 wiretap in yet when we were taking photographs. The reason
3 I say that is because I recall Aguiluz being up with me
4 and Nueou and Daily being up with me from the observation
5 post where we took photographs. I can't really say if we
6 had the wiretap in at that time. The first thing we did
7 when he got there was set up photographic observation.
8

9 Q On the photographs that were offered in evi-
10 dence in this case, did they have dates on the back of them?

11 A No.

12 Q Would you testify as to the date you took the
13 photographs in court?

14 A On some -- I believe I did on some of them, yes

15 MR. STONE: I ask the Government if they can
16 furnish me with the trial transcript to refresh
17 the witness's recollection.

18 MR. CLAYMAN: Is it necessary?

19 THE COURT: If you have it.

20 MR. CLAYMAN: I have some of it.

21 THE COURT: Your testimony was fairly exten-
22 sive, wasn't it?

23 MR. CLAYMAN: No, your Honor.

24 THE COURT: Short.

25 MR. CLAYMAN: Not extensive at all.

THE COURT: See if you can find it.

MR. STONE: I'll continue if you'll let me come back to it.

MR. CLAYMAN: I have it.

(Handed to Mr. Stone by Mr. Clayman.)

Q Officer Sottile, I show you your testimony, page 942 until 948 and ask you to read it over, if you would (handing to witness) and see if that would refresh your recollection.

(Pause)

Q Does that refresh your recollection as to approximately what dates you took these photographs?

A Yes.

Q When?

A Between the 2nd and the 9th of September 1974.

Q 1974?

A I'm sorry, 1970.

Q During that early period of time, September, was the illegal wiretap already installed?

A It was definitely installed prior to the arrest of Olate and Quintanilla.

Q How long before?

A A matter of days. I couldn't tell you exactly what date it was installed.

Q Would you say about four or five days at least before the arrest of Quintanilla and Olate?

A I would say so.

Q Did you arrest Quintanilla and Olate on September 10th, 1970?

A The 10th or 11th.

Q The night of the 10th and early morning of the 11th?

A Yes.

Q That was at the Century Paramount Hotel?

A Yes, in front of it.

Q You testified in court that you went to that hotel on the basis of information you received; is that correct?

A Yes.

Q Did you advise the Court or the United States Attorney that some of the information you received prior to going to the Century Paramount was information from illegal wiretap?

A No.

Q When you arrived at the Century Paramount, you made an arrest and you seized narcotics?

A Yes.

Q And you testified about that in this trial:

1 is that correct?

2
3 A Yes.

4 Q Prior to the arrest of Olate-Romero, had you
5 previously taken pictures of them?

6 A Yes, but I hadn't had them developed yet, but
7 I had known -- one of them shows up in the picture,
8 Quintanilla.

9 Q I call your attention to page 953-954 con-
10 cerning the arrest and the photographs and ask you if that
11 will refresh your recollection as to how you testified in
12 the first trial (handing to witness). Isn't it bottom of
13 953, sir?

14 (Pause)

15 Q Does that refresh your recollection as to
16 whether or not you had photographs with you at the time
17 that you made the arrest of Olate and Quintanilla?

18 A What I said here is true and what I have just
19 told you is true.

20 Q Did you have photographs of Olate and Quintan-
21 illa at the time you made their arrest?

22 A I don't believe I physically had photographs
23 on me at the time I made the arrest. I don't think I had
24 had them processed, but, as I said here, I had taken their
25 photographs and I immediately recognized them, because I had

1
2 followed them before.

3 Q Did you follow them because you overheard a
4 conversation in this illegal tap?

5 A I don't recall.

6 Q How many reels would you estimate were
7 obtained from this illegal tap?

8 MR. CLAYMAN: Objection, your Honor.

9 THE COURT: Sustained.

10 Q Do you know where Detective Riviera is now?

11 A No, sir.

12 Q Detective Martinez?

13 A No, sir.

14 Q Is it fair to say you haven't kept in contact
15 with any of the detectives you worked with then?

16 A That's true.

17 MR. STONE: Might I have a few minutes, your
18 Honor.

19 THE COURT: Yes.

20 (Pause)

21 THE COURT: Anything further?

22 MR. STONE: I'm asking Mr. Hernandez if
23 there is anything else he can think of. I'm not
24 planning to ask any unless he has a particular
25 suggestion.

THE COURT: Any cross-examination?

MR. CLAYMAN: Just one or two questions.

THE COURT: Go ahead.

CROSS EXAMINATION

BY MR. CLAYMAN:

Q Detective Sottile, during the time that you were working on the investigation of the Chile-Lindo restaurant, were you aware of what investigation Detectives Tucket or Cruet or Brodeur were working on?

A No.

Q Did you talk with them at this time?

A No, I never had any conversations.

Q When was the first time to your knowledge -- When was the first time it was brought to your attention that the seizure, the arrest of Olate and Quintanilla had any relationship to the investigation that Tucket, Cruet and Brodeur were conducting?

A When I was called down here to the Eastern District to prepare my material for the case.

Q That was well after the arrest in this case; is that correct?

A Yes, immediately prior to this case.

Q Did you know that they were conducting wiretaps of Madelaine Pineda or Enrique Hernandez or Mr. Miller?

1
2 A No.

3 Q At the time you were working at SIU, how
4 many people were working in the unit?

5 A Seventy-five.

6 MR. CLAYMAN: No further questions.

7 THE COURT: Did you lie at the trial before
8 me?

9 THE WITNESS: Your Honor, with respect to the
10 fact that I originally went to the Century Paramount
11 as a result of what an informant told me, I lied.
12 That information actually came from illegal wiretap,
13 but it was very sketchy information. It was just
14 a room number, and from that room number I developed
15 who Gilberto Pasquale was, and I went on to observe
16 him and then he led me to others that I had visually
17 observed and taken photographs of at the Chile-Lindo.

18 THE COURT: The detective was cross-examined
19 rather thoroughly.

20 What else do you have?

21 Thank you very much, sir. That will be all.

22 (Witness excused)

23 MR. STONE: I would serially call Detective
24 Aguiluz.

25 MR. CLAYMAN: Detective Aguiluz is not here.

Detective Sottile testified what occurred over those wires and the relationship, if any, they have. Detective Aguiluz is a detective who is cooperating with the Government in various SIU cases. I fail to see how his presence would aid the hearing.

MR. STONE: He would be instrumental. He was the Spanish-speaking officer.

It is our claim there was an illegal tap, we clearly established on direct examination --

THE COURT: Well, is there any of the Spanish-speaking people around?

MR. CLAYMAN: No, your Honor. We have Detective Brodeur, Cruet, and Tucket, who worked with the wire tap, which was litigated at the trial, wiretap that you questioned them about. They're here today to answer any questions that Mr. Stone may have.

THE COURT: Did any of the information that you had result in the wiretap that was used in this case?

MR. SOTTILE: No, I have no knowledge of that team's activities or these people.

THE COURT: I don't understand the connection. There was an illegal wiretap. There are a lot of illegal activities, but that doesn't give you the right to reopen every case. I don't understand --

1 MR. STONE: If we can show, and we hope to,
2 that this information was given to Egan and Egan
3 might have supplied some of that information to the
4 other officers --

5 THE COURT: They're here.

6 MR. STONE: That's right. I would like to
7 go in order, if I could.

8 THE COURT: Bring them up.

9 MR. CLAYMAN: Brodeur, do you want him first?

10 MR. STONE: I prefer to develop, if we're
11 going to have to adjourn for Aguiluz --

12 THE COURT: I don't want to. It seems to me
13 too tenuous. We went into this fully at the last
14 trial. I just don't see it.

15 I gave you full opportunity to try the illegal-
16 ity of the wiretap.

17 MR. STONE: I'm not criticizing anybody in
18 hindsight, your Honor. I did not try the issue.
19 One attorney represented four defendants, two of
20 which were subjects of wiretap, Enrique Hernandez and
21 Madelaine Pineda. Perhaps in his haste, he neglected
22 to bring forward a requirement for minimization and
23 a requirement for notice.

24 THE COURT: Well, that may be, but we're cer-
25 tainly not going to retry that issue at this time.

Let's have a break for a few minutes. Make it brief and get to the point. I have another trial starting and thus far --

MR. CLAYMAN: We have both Cruet and Tuckett outside if Mr. Stone would like to speak to them.

(Recess)

THE COURT: I have resealed the material that was unsealed. Counsel is instructed not to reveal its contents to anyone, including the defendant.

THE CLERK: Who is the next witness?

MR. CLAYMAN: Mr. Stone has talked to the three detectives.

THE COURT: Do you want them for anything?

MR. STONE: No, I don't.

THE COURT: Do you have any further evidence?

MR. STONE: I would like to call the defendant to the stand.

THE COURT: You may.

MR. STONE: On second thought, the defendant has asked me to call Brodeur, and I will at this time.

THE COURT: Very well.

O W E N B R O D E U R, Shield 564, 110th Precinct,
Investigating Unit, called as a witness, being first
duly sworn by the Clerk of the Court, testified as
follows:

THE CLERK: Full name, and spell your last
name for the record.

THE WITNESS: Owen Brodeur, B-r-o-d-e-u-r.

DIRECT EXAMINATION

BY MR. STONE:

Q Detective Brodeur, did you sign an affidavit
on September 25th, 1970 requesting that a telephone tap be
placed on the phone of Enrique Hernandez?

A Yes,

Q Did you also sign an affidavit on the 23rd
of October, 1970, requesting that a telephone tap be placed
on the phone of Madelaine Pineda?

A Yes.

Q Did you personally give those affidavits to
the judge?

A Did I personally?

Q Yes.

A Yes.

Q You were present when the judge signed them?

A Yes.

Q He asked you certain questions; is that right?

A Yes.

Q During the month of September of 1970 did you personally conduct any surveillance directed toward the person or premises occupied by Enrique Hernandez?

A During the month? Yes.

Q What period of time did you devote surveillance towards Mr. Hernandez?

MR. CLAYMAN: I would object to this line of questioning.

THE COURT: What ground?

MR. CLAYMAN: This wiretap is fully litigated, cross-examined extensively on trial. His counsel -- whatever his contention is, somehow or otherwise that it affected this one, he has cross-examined Mr. Sottile. If he wants to ask this detective whether he has or has not, whether the surveillance -- I don't think it's relevant.

THE COURT: Can you get to the main point, please, without --

MR. STONE: After this question.

THE COURT: Answer the question, if you can.

A You asked broadly what surveillance I conducted?

Brodeur-direct

Q That's right.

A I was part of a team and the team conducted surveillance. Other members conducted part of it. At this late date I can't say exactly what parts I conducted.

Q Would you say you spent at least twenty hours during the month of September actually with a team surveilling Enrique Hernandez?

A Actually, not to my knowledge, I don't believe.

Q Did you conduct an investigation where Enrique Hernandez was the target for over two weeks during the month of September?

A He was the subject in a large investigation, not specifically just the target.

Q How much time did you spend investigating him?

A I have no idea.

Q More than two weeks?

A In the whole investigation?

Q Yes, prior to the time you got the wiretap order.

A Prior to the time we got the wiretap order, I couldn't say exactly the time. In the vicinity of two weeks, more or less, I can't say exactly.

Q Do you remember any person seeing Enrique Hernandez before receiving the wire tap?

1
2 A I'm trying to remember between three wire taps.
3 I think there were times when he came out of the house.
4 I know there was a time that my partner saw him and I can't
5 remember specific times right now, sir.

6 Q Did you know Lieutenant Egan on the 23 of
7 September, 1970?

8 A Yes, I did.

9 Q Was he your commanding officer?

10 A Yes, he was.

11 Q Was he also the commanding officer of then
12 Sergeant Sottile?

13 A Yes.

14 Q Did you ever have any conversation with Egan
15 concerning your investigation of Enrique Hernandez or James
16 Miller?

17 A Yes, I did.

18 Q Did he advise you that any of them were seen
19 at the Chile-Lindo restaurant?

20 A No.

21 Q Did you ever discuss the Chile-Lindo restaurant
22 with Lieutenant Egan?

23 A I think one time we told him Chile-Lindo came
24 up, that I heard the name Chile-Lindo. He said -- I'm not
25 ready to say the exact words but I remember something to

1
2 the effect of "Well, that may have something to do with
3 another investigation. You stay on yours and stay away
4 from there."

5 He said he didn't want the two investigations
6 going together, and that was all.

7 Q Did he give you the names of any of the
8 people in the other investigation?

9 A No, they were all kept strictly secret.

10 Q Did you co-ordinate your investigation with
11 Lieutenant Egan?

12 A We gave him all of our information. He did
13 the coordinating and then the other investigations, we had
14 no knowledge of any other investigations.

15 Q Did he help you draw up your wiretap affidavits?

16 A No, sir.

17 Q Do you know how many wire taps were on the
18 phone of Enrique Hernandez?

19 A One.

20 Q Was that in the Bronx?

21 A Yes.

22 Q Was there any wire tap on Mr. Enrique Hernandez
23 in Westchester County that you know of?

24 A No.

25 Q Are you aware of any illegal wiretaps conducted

by any agents that you were working with or cooperating with between September and November of 1970?

A None at all, sir.

Q You're not aware of any?

A No, sir.

Q Did you ever receive any information from Detective Aguiluz?

A No.

Q Do you know him?

A Yes.

Q Did you ever talk to him between September and November of 1970?

A On payday, a good portion of the men assigned to the office used to come into the office to pick up their checks. I may have talked to him then. I had no private dealings with him or talks with him. I knew him from the office to say hello, that's all.

Q Did you know Sergeant Sottile?

A Yes.

Q Did you talk to him?

A The same way.

Q Did you ever discuss your cases with him? Did he ever discuss your cases with you?

A Only when the case was being prepared here

in this building.

Q When did you first become aware that Sergeant Sottile conducted an illegal wiretap at the Chile-Lindo restaurant?

A When I heard it from the Assistant U.S. Attorney.

Q That's Mr. Clayman?

A Yes.

Q You heard that today or a couple of days ago?

A Yesterday or the day before.

Q The only informant that you had was the one you discussed with Judge Weinstein in 1971; is that correct?

A Yes, sir.

Q And you received no information from any other police officer that you didn't tell us about?

A No.

Q Did you ever receive any information from Detective Luci?

A No.

Q You know Detective Luci?

A Yes.

Q Do you know Detective Annunziata?

A Yes.

Q Did you ever receive any information from

1
2 Detective Annunziata?

3 A I never worked with them.

4 Q In your wire taps of Enrique Hernandez and
5 Madelaine Pineda, did you ever overhear them call the Chile-
6 Lindo restaurant?

7 A I remember vaguely about the Chile-Lindo
8 coming up. Whether it was incoming call and the name Chile-
9 Lindo restaurant was mentioned, or outgoing call that went
10 to the Chile-Lindo and that's how we learned the name, I'm
11 not sure. I know it came up very briefly. It was mentioned
12 very briefly and we were told to stay away, it might be part
13 of another investigation. They didn't want everybody running
14 over one another.

15 Q You heard the reels of tapes on Hernandez'
16 phone; is that correct?

17 A Yes.

18 Q Were there any incoming calls to Hernandez
19 from the Chile-Lindo?

20 A I just said, sir, there were incoming calls
21 and outgoing calls, but I don't know now whether or not,
22 which was which. I don't know whether the call mentioning
23 the Chile-Lindo restaurant was incoming or whether it was
24 going out, and we got the location or the name of Chile-
25 Lindo. We had nothing to do with it in our investigation.

Q How many phone calls did you hear on the Hernandez tap?

MR. CLAYMAN: Objection, your Honor.

THE COURT: We have gone through this.

MR. STONE: A question of what you allow me to go through on minimization, if anything, your Honor.

THE COURT: I will not. Not at this stage.

MR. STONE: Your ruling, it's been waived or gone into before.

THE COURT: It's not before me. There's certainly no basis for a new trial at this stage.

Thank you very much, Detective. That will be all.

(Witness excused)

THE COURT: Any further witness available at this time?

MR. STONE: Mr. Hernandez himself, your Honor.

I have been given the opportunity to discuss this with Mr. Cruet and Mr. Tuckett, and I have no desire to call them.

THE COURT: Very well.

Swear the next witness, please.

ENRIQUE HERNANDEZ, called as a witness,
having been duly sworn by the Clerk of the Court,
testified as follows:

THE CLERK: Full name.

THE WITNESS: Enrique Hernandez.

DIRECT EXAMINATION

BY MR. STONE:

Q Mr. Hernandez, could you tell us where you
lived in August of 1970?

A Claflin Avenue in the Bronx.

Q 2712 Claflin Avenue?

A Yes.

Q You remember what your telephone number was?

A Five four --

Q Was it 543-7583?

A Yes.

Q During the months of early September until the
middle of November of 1970 did you have occasion to talk over
the telephone with one James Miller?

A Yes.

Q How many occasions?

A Quite a few occasions.

Q Did you have occasion to talk over the tele-
phone with your brother, Martin Hernandez and Victor Hernandez?

1

2

A Quite a few occasions.

3

Q Did you have occasion to talk over the tele-

4

phone with Madelaine Pineda?

5

A Yes.

6

Q Did you have occasion to talk over the tele-

7

phone with Mario Sepulveda?

8

A Quite a few occasions.

9

Q Speak broken English and Spanish; is that

10

correct?

11

A Yes.

12

Q Did you ever have occasion to use the tele-

13

phone at the Chile-Lindo bar or restaurant?

14

A Quite a few times.

15

Q Could you tell us when you used their phone

16

and who you talked to?

17

A Well, I mostly in around September, I called

18

Madelaine Pineda quite a few times. I called my brother

19

and I called James Miller.

20

Q Which brother did you call, or both?

21

A Both.

22

Q On any of the conversations you had with

23

any of these people, was it related to narcotic drugs?

24

A Yes.

25

Q Did you know that the Chile-Lindo telephone

1
2 was tapped?

3 A No.

4 Q Did you use your name when you made these
5 phone calls?

6 A Yes.

7 Q Did you ever receive any telephone calls at
8 the Chile-Lindo Restaurant?

9 A Quite a few.

10 Q From who?

11 A From Madelaine Pineda, Mario Sepulveda, and
12 my brother, Martin Hernandez, and my brother Victor Hernandez

13 Q While you were home, did you ever receive
14 calls from any person who informed you they were at the
15 Chile-Lindo restaurant?

16 A Yes.

17 Q Who?

18 A Mario Sepulveda, Madelaine Pineda and Victor
19 and Martin Hernandez, my brothers.

20 Q Now, on September 17th, 1970, did you know
21 an Augusto Lorez?

22 A Not that I recall.

23 Q Specifically, on September 1970 did Augusto
24 Lorez enter your apartment at 2712 Grafton Avenue, the
25 Bronx?

1

2

A Not that I recall.

3

Q Did you ever call Joe Gernie from the Chile-

4

Lindo restaurant?

5

A I can't recall that. I doubt that. I don't

6

think so.

7

Q Did you ever make a telephone call from the

8

Chile-Lindo restaurant to James Miller, telling him that

9

there was \$500 short?

10

A That wasn't from the Chile-Lindo, no.

11

Q Do you remember where that call was from?

12

A Yes. That was from my house.

13

Q Do you know Celestino Valverde?

14

A Yes.

15

Q Did you ever discuss or did you ever call him

16

at the Chile-Lindo?

17

A No.

18

Q Did you ever see him at the Chile-Lindo?

19

A Yes.

20

Q Did you ever go to the Century Paramount

21

Hotel?

22

A Never.

23

MR. STONE: Your Honor, would you let me go

24

into the fact that the Government claims that the

25

defendant received adequate notice in their answer?

1
2 THE COURT: No.

3 MR. STONE: The reason I would like to inquire
4 is the fact one attorney represented four defendants.

5 THE COURT: No, too late for that.

6 MR. STONE: I'm sure you're familiar with the
7 Court of Appeals case, conflict of interest, two
8 defendants, that was before Judge Mishler.

9 THE COURT: I am, and I granted a new trial
10 on that basis, but not after some years. I'm not
11 going to go into that matter. My opinion the defend-
12 ant was tried fairly and the evidence was overwhelming.

13 His conviction was not due to any possible
14 conflict.

15 MR. STONE: The only reason I bring that out,
16 your Honor, that there was no inquiry either as to
17 notice or demand for minimization.

18 THE COURT: I understand that.

19 MR. STONE: That might have been occasioned
20 because the attorney that represented Enrique
21 Hernandez in this matter also represented Martin
22 Hernandez in the state court and Martin would not be
23 the defendant that was aggrieved and therefore he
24 didn't concentrate his issues on the aggrieved
25 defendant. It could have been a very slight

oversight but maybe instrumental as to Enrique Hernandez.

THE COURT: No, it was not due to any conflict.

MR. STONE: No further questions.

THE COURT: Thank you very much. Step down.

THE WITNESS: Might I say something?

I talked to ex-detective Nuveou. He's in Lewisburg now. He told me of the surveillance they did have on Mario Sepulveda and Valverde and all of them, Olate, and he says they were following them nearly every day and they did get them all from the wire taps and he did say that Mr. Cruet and Mr. Brodeur, he says Mr. Cruet and Brodeur, that was their bag in illegal wiretapping.

THE COURT: I'm not going to take that hearsay on hearsay.

Do you have an affidavit?

MR. STONE: I would like to call him, your Honor.

THE COURT: No. Go down to get the affidavit. I'm certainly not going to bring him up on the basis of what you heard here.

MR. STONE: The problem there, your Honor,

1 candidly is that his appeal is still pending in the
2 Second Circuit.

3 THE COURT: I'm not going to do anything with
4 the case on the basis of what I have. The whole
5 thing is too tenuous. Whatever we have had here,
6 and it's very slight, would be cumulative.

7 THE DEFENDANT: He even asked me, your Honor,
8 if I did subpoena him, he would only tell the truth
9 and I told him --

10 THE COURT: I'm not going to bring him up
11 here on the basis of what I have. If you want to
12 go down to get his affidavit -- There are all
13 these rumors floating around in jail. I can't re-
14 try cases four years later on the basis of this kind
15 of information.

16 Anything I heard today would have produced
17 not the slightest difference at the trial.

18 MR. STONE: Produced the suppression of the
19 narcotics seized --

20 THE COURT: Nothing that I heard here would
21 have affected my decision, and nothing that I heard
22 here would have affected the jury's decision.

23 MR. STONE: I'm referring to the narcotics
24 received in the Century Paramount introduced in this
25 trial. Had you known of the illegal wiretap you

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might have felt that that was an illegal lead, and that the narcotics were seized as the fruits of that wiretap. You may not have allowed it into evidence and the jury may not have been swayed on the basis of less narcotics being brought into the case.

THE COURT: What's the Government's view on that?

MR. CLAYMAN: The Government's opinion (1) of your Honor, Brown v. the United States, Supreme Court 411, U.S. 221, a copy of which I have, it's argued the defendant Hernandez -- he would have no standing to object to that seizure of narcotics. Moreover, the standard on a new trial, as your Honor said, is whether newly discovered evidence, whether this would in any way have affected the jury's verdict.

As your Honor said, this was just part of some of the narcotics brought in, although a small part. It didn't bear directly on Enrique Hernandez. The Government feels that the information that we have had today, no way would have changed the verdict, the fact that the defendant Enrique Hernandez would not have standing to challenge.

MR. STONE: A motion by Mr. Lanna on page 1163 concerning Detective Sottile's testimony, we think it was late for him to make the motion. Had he

1 known of illegal wiretaps, he might have made the
2 motion, tried the case differently. Your rulings
3 may have been different as far as a severance. It's
4 hard to tell what rulings would have been made.

5 THE COURT: That's why they require a very
6 heavy burden before a new trial can be granted.
7 We can't retry these things over and over again.

8 The defendant, I thought, had a very fair
9 trial. He was convicted out of his own mouth,
10 his wiretaps were very convincing, and the wiretap
11 that we had in the case and that was introduced
12 was legally obtained. There is no indication to
13 the contrary.

14 MR. STONE: I think your Honor, to further
15 and completely develop the Chile-Lindo wire tap and
16 any leads, you would almost have to have Aguiluz
17 as a witness. He's the only one that spoke Spanish
18 that was aware of the situation. I would be willing
19 to continue it at any time --

20 THE COURT: I simply am not going to call
21 in a whole series of witnesses on the basis of what
22 you have shown here. It's just too tenuous.

23 MR. STONE: The only one that should be called
24 in is Aguiluz.

25 THE COURT: I'm not going to do it.

1 MR. STONE: Strictly under the Government's
2 control.

3 THE COURT: I'm not doing it.

4 These seem to me to be stabs in the dark.
5 There is information now abroad that a number of
6 people involved in narcotics control were crooks.
7 That is not the basis for setting aside every one of
8 these verdicts and going into background on each of
9 them. There's no indication here of any connection.

10 I'm sorry. I haven't the slightest doubt
11 of Mr. Hernandez's conviction on the basis of the
12 evidence we had.

13 Thank you very much. Motion denied.

14 MR. STONE: The Government has ordered the
15 minutes. Would you approve?

16 THE COURT: Is the defendant without funds?

17 All right.

18 MR. CLAYMAN: We received an affidavit,
19 notice from the Court of Appeals that the defendant
20 had made an application for treatment in forma
21 pauperis, appointment of counsel. That was denied
22 by the Court of Appeals on September 11, 1974.
23 I believe the Court of Appeals --

24 THE COURT: I have the defendant here.

25 Are you without funds now?

1 THE DEFENDANT: Yes.

2 THE COURT: You have no money at all?

3 THE DEFENDANT: None, your Honor.

4 MR. STONE: The defendant's motion to the
5 Court of Appeals, which I was informed about from
6 the defendant today and by the Government last week,
7 was for a minimization hearing. I think you denied
8 his motion in 1972 and then he appealed from that and
9 about a year later the Government denied him leave
10 to proceed in forma pauperis.

11 MR. CLAYMAN: This occurred on September 11th
12 1974, your Honor.

13 MR. STONE: That was when the Government --

14 THE COURT: It doesn't make any difference
15 what the Court of Appeals did. They didn't have
16 his testimony before me. It's before me now.

17 I believe him when he says he's without funds.

18 Thank you, gentlemen.
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MEMORANDUM OF LAW OF DA OF WESTCHESTER
COUNTY, FILED SEPTEMBER 8, 1976
(pp. 115a to 120a)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES EX REL MARTIN HERNANDEZ
AND VICTOR HERNANDEZ,

Petitioners

76 C 1495

- against -

WALTER FOGG, SUPERINTENDENT, GREENHAVEN
CORRECTIONAL FACILITY, STORMVILLE,
NEW YORK,

Respondent.

MEMORANDUM OF LAW

FILED
U.S. DISTRICT COURT E.D. N.Y.

SEP 8 1976

TIME AM.....
PM.....

CARL A. VERGARI
District Attorney of Westchester County
Office and Post Office Address
County Courthouse
111 Grove Street
White Plains, New York 10601
(914)682-2161

By: JANET CUNARD
Assistant District Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES EX REL MARTIN HERNANDEZ
AND VICTOR HERNANDEZ,

Petitioners

- against -

76 C 1495

WALTER FOGG, SUPERINTENDENT GREENHAVEN
CORRECTIONAL FACILITY, STORMVILLE,
NEW YORK,

Respondent.

-----X
MEMORANDUM OF LAW

FACTS

The defendants were convicted of the possession of four kilos of cocaine which they were carrying in a shopping bag at the time of arrest. This cocaine, as testified to by co-defendant Mario Sepulveda (a/k/a Victor Dragon), had been purchased by them minutes before from Madeline Pineda in her apartment from which they had just exited.

Detective Lionell Tuckett observed Sepulveda enter the apartment building carrying a shopping bag, looked in the shopping bag and saw a bag containing white powder which, based upon his experience, he believed to be a half kilo or a kilo (the difference in size is in the depth not the surface area) of narcotics. Tuckett and Sepulveda rode up together in the elevator, Tuckett walking the last

flight to the eighth floor. Tuckett observed Mario entering the Pineda apartment still carrying the shopping bag. About five minutes later Tuckett saw the defendants enter the Pineda apartment carrying nothing, and about five minutes later exit carrying the shopping bag Sepulveda had carried in ten minutes earlier. Tuckett approached the defendants, looked in the shopping bag, saw the same white bundle he had observed earlier, and placed the defendants under arrest. Chemical analysis showed the contents of the shopping bag to be four kgs. of 90 per cent pure cocaine.

POINT I

THIS COURT LACKS SUBJECT MATTER JURISDICTION

The defendants were convicted and sentenced in the County Court, Westchester County and are currently imprisoned in the Greenhaven Correctional Facility, Stormville, New York (Dutchess County). The defendants were sentenced by a Court in the Southern District and are confined in a correctional facility in the Southern District (28 USC 112c). It is respectfully submitted that the instant proceeding should be dismissed for lack of subject matter jurisdiction (US ex rel Ayala v. Taubman, 366 FS 1268; US ex rel Griffin v. LaVallee, 270 FS 531).

POINT II

THE DEFENDANTS' PETITION FOR A WRIT OF
HABEAS CORPUS SHOULD BE DENIED

The defendants seek a rule of law of guilt by association. They allege that because a former police officer named Sotille¹ committed unlawful acts, the acts of other police officers must also be unlawful. There is no such presumption known to law.

The defendants refer to certain events which led to the illegal importation of 21 kgs. of cocaine on September 6-7, 1970 and the subsequent conviction of those involved. (US v. Borrone - Iglar, 468 F2 419 (1972), cert den 410 US 927). They also refer to certain events leading to the illegal importation of 40 kgs. on November 6-7, 1970 which led to a portion of the charges in Borrone - Iglar and 4 kgs. of which form the basis of the instant conviction, (People v. Pineda, 41 AD2d 805, 341 NYS2d 589, leave denied, Fuld, J). While the parties involved in the large scale cocaine distribution may in many cases have been the same, the convictions are based upon separate shipments and unrelated.

The defendants allege that they sought in the State courts to challenge the legality of the Miller wiretap and that their motion was denied by order of Hon. Timothy J.

¹Sotille was not involved in the instant case.

Sullivan dated May 12, 1971. An examination of the defendants motion (copy annexed hereto) will show that the only allegation was the conclusory statement that there was a lack of probable cause. There was never any claim that the informant did not exist and no basis for the claim at this time. In the affidavit in support of the application for an eavesdropping order, Det. Brodeur stated that the name of the informant was given to the Judge and Judge Sandifer initialed that statement. Defendants also seek to fault Det. Brodeur for not knowing the names of the persons he saw leaving Miller's apartment--his affidavit did not allege that he knew them by name but only that they were known as dealers (see, e.g. United States v. Harris, 403 US 573), a statement in no way contradicted.

The defendants were given full opportunity to contest the legality of the eavesdropping orders in the State courts and did litigate their validity in the trial court and on appeal. Relief by way of habeas corpus will not lie (Stone v. Powell, US , 44 LW5313). The defendants chose only to litigate certain aspects of the eavesdropping order and cannot expand their attack after conviction and direct review (People v. Tutt, 38 NY2d 1011). In any event, the defendants' allegations are insufficient to question the validity of the order

which has previously been upheld by both the state and federal courts. At best the defendants only allege that the officers initially began their surveillances because they obtained information from unlawful sources. Such allegations, even if based on facts would be insufficient to raise a question as to the validity of the conviction (People v. Mendez, 28 NY2d 94, cert den 404 US 911).

The defendants have shown no violation of their constitutional rights.

CONCLUSION

The instant petition should be in all respects denied.

Respectfully submitted,

CARL A. VERGARI
District Attorney of Westchester County
County Courthouse
111 Grove Street
White Plains, New York 10601
(914)682-2161

By: JANET CUNARD
Assistant District Attorney

EXHIBIT - EAVESDROPPING WARRANT,
ANNEXED TO MEMORANDUM OF LAW
(pp. 121a & 122a)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter :
of :
the interception of telephonic communica- : EAVESDROPPING
tions of James Miller a/k/a "Pluggie," : WARRANT
over telephone bearing number 368-4946 :
listed under the name of James Miller and :
located at 2569 Seventh Avenue, New York, :
N.Y. apartment 8J. :
-----X

It appearing from the affidavit of Frank S. Hogan,
District Attorney of the County of New York, and the accom-
panying affidavit of Detective Owen A. Brodeur said affidavits
having been submitted in support of this eavesdropping
warrant and incorporated herein as a part hereof, that there
is probable cause to believe that evidence of the crimes
of criminal possession of a dangerous drug in the first
degree and criminally selling a dangerous drug in the second
degree, in violation of sections 220.33 and 220.44, respective-
ly, of the Penal Law of the State of New York, may be obtained
by intercepting the telephonic communications transmitted
over the telephone line and instrument assigned number
368-4946 described above, and the Court being satisfied
that comparable evidence essential for the prosecution of
said crimes could not be obtained by other means, it is

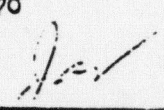
ORDERED, that the District Attorney of the County
of New York, or any police officer acting under his direction
is hereby authorized and empowered to intercept and record

telephonic conversations of James Miller a/k/a "Pluggie," his co-conspirators and agents, over the above described telephone pertaining to the purchase, sale, transfer, shipment, or possession of narcotic drugs relating to the above mentioned crimes; and it is further

ORDERED, that this order shall be conducted in such a way as to minimize the interception of communications not related to the aforementioned crimes and that nothing herein contained shall be construed as authorizing the District Attorney or his agents to intercept or overhear any communications of James Miller a/k/a "Pluggie," his co-conspirators and agents, which is otherwise privileged; and it is further

ORDERED, that this order shall be executed as soon as practicable and shall be effective from the 3rd day of September, 1970, and shall continue until evidence as described in the aforementioned affidavits shall have been obtained, and said authorization shall not automatically terminate when the communications described herein have first been obtained, but in no event to exceed thirty (30) days from said effective date, i.e., October 2, 1970.

Dated: New York, September 3, 1970


Justice of the Supreme Court

JAWN A. SANDIFER

AFFIDAVIT OF A. SMULEVITZ SWORN
TO NOVEMBER 23, 1976
(PP. 123a & 124a)

UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

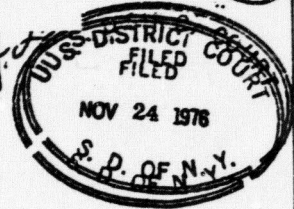
UNITED STATES OF AMERICA ex rel.
MARTIN HERNANDEZ and VICTOR HERNANDEZ,

Petitioners,

-against-

WALTER FOGG, Superintendent, Green Haven
Correctional Facility, Stormville, New
York,

Respondents.



AFFIDAVIT

75 Civ. 4747
Pro Se

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ALAN R. SMULEVITZ, being duly sworn, deposes and
says:

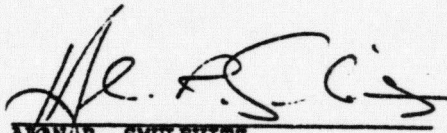
1. I am an Assistant Attorney General in the office
of LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
attorney for respondent.

2. Upon examination, your deponent agrees with the
position taken by Hon. Carl A. Vergari, District Attorney of
Westchester County, in his memorandum of law filed herein. Your
deponent re-emphasizes the holding in Stone v. Powell, 44 U.S.L.W.
5313 (July 6, 1976), which applies to the case at bar. The
Supreme Court summarizes at 5321, 5322:

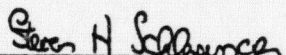
"In sum, we conclude that where the
State has provided an opportunity for
full and fair litigation of a Fourth
Amendment claim, a state prisoner may
not be granted federal habeas corpus
relief on the ground that evidence
obtained in an unconstitutional
search or seizure was introduced at
trial. In this context the contri-
bution of the exclusionary rule, if
any, to the effectuation of the Fourth
Amendment is minimal and the sub-
stantial societal costs of application
of the rule persist with special force."

Petitioner has been afforded "an opportunity for full and fair litigation", thus precluding the relief he seeks in this action.

WHEREFORE, respondent respectfully requests that the instant petition be dismissed in all respects.


ALAN R. SMOLEVITZ

Sworn to before me this
23rd day of November, 1976


Assistant Attorney General
of the State of New York

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF

United States of America ex rel.
MARTIN HERNANDEZ and VICTOR HERNANDEZ

TRAVERSE OF M. & V. HERNANDEZ
DATED DECEMBER 21, 1976
(pp. 125a to 128a)

JAN 23 1977

Petitioners,

-against-

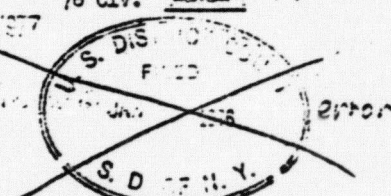
WALTER LACE, Superintendent Green Haven
Correctional Facility, Stormville, N.Y. 12582

FILED IN CHAMBER TRAVERSE
OF JUDGE HENRY D. WERKER

76 Civ. 4747-HW

Respondent.

STATE OF NEW YORK) ss.:
COUNTY OF DUTCHESS)



MARTIN HERNANDEZ and VICTOR HERNANDEZ, being duly sworn depose and say:

1. That we are the petitioners herein and submit this affidavit in Traverse of the respondents opposition submitted herein by Alan R. Smulevitz, Assistant Attorney General for the State of New York.

2. After a review of the record in this proceeding the Honorable Court will become aware that the original writ was filed in August of 1976 in Eastern District of New York with the Honorable Jack B. Weinstein in incorporated with our federal conviction under the Docket number (71 Cr. 874). Our reasons for this was that Judge Weinstein's familiarity with the case[he was presiding Judge at our trial], and also that Judge Weinstein presided at a hearing at which former Detective Soltila of the Special Investigations Unit made known several years after our trial that our arresting officer Detective Egan of S.I.U. was involved in illegal wire-tapping at premises in which our drug transactions emanated.

3. Additionally Judge Weinstein was kind enough to make available those transcripts as well as all our federal trial minutes without which this petition could not have been possible. All this is to say that even at this juncture we believe this petition should be in Eastern District whereas Judge Weinstein who has a full knowledge of all these proceedings, has previously seen the demeanor of most of the parties involved would more easily render a decision in this case. Neverthe-less in October of 1976,

without any prior notice to us , the Attorney General's Office of New York made an appearance before Judge Weinstein and the instant petition was transferred together with all the records in this case to be heard in the Southern District. Thereafter a string of unreasonable delays was sought by Alan R. Smulevitz, the Assistant Attorney General assigned to this petition. We also wish to note that we have been unable to find out what Docket number has been assigned to our case(petition) in the Southern District is, nor can we learn the name of the Judge who is handling it. Also strangely the Asst. Attorney General fails to put the Docket number on his papers or the Judges initials.

4 . We now wish to answer and traverse the opposition of the respondent herein. Respondents one page opposition does not seek to uphold the reason our constitutional claims were denied in the Courts of New York State, namely that our allegations were based on newspaper articles. Wisely, because after an examination of our petition one will see that not one fact is based on or relied upon by any newspaper articles whatsoever.

5 . Instead respondent relies solely on a case entitled Stone v. Powell, having come from the Supreme Court of the United States and which he cites as 44 U.S. L.W. 5313[July 6, 1976], which purportedly applies to our petition. With all due respect to the Justices of the Supreme Court we now wish to give this Court our evaluation of Stone v. Powell, and how in our opinion it is not applicable to our petition and not a bar to the federal relief we seek.

6 . Respondent would have us believe that the Stone v. Powell, holding would bar our presenting collateral constitutional issues which were revealed some three to four years after our original trial and direct appeals, simply because a Fourth Amendment issue is involved among many others, (e.g. perjury by police officers). Let us cite some of the language from Stone v. Powell , 19 Cr L 3333(July 7, 1976).

"We hold, therefore, that where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a State prisoner be granted federal Habeas Corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial". (at pg. 3337)

Further-more the Court went on to say:

"The force of this justification becomes minimal where federal Habeas Corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search and seizure claim at trial and on direct review." (19 Cr. L. 3339)

7 .

Petitioner's respectfully ask this Court to take notice of the fact that the allegations we raise in this petition could not have been raised had it not been for the hearing minutes of November 15, 1974, Eastern District of New York, Jack B. Weinstein, U.S.D.J. presiding, when former Detective Soltils revealed that Lt. John Egan, one of the arresting officers in our case, knew of illegal wiretapping at a location where your petitioners made drug transactions. That documentary proof combined with the other allegations in our petition along with the affidavit of Victor Hernandez from our Habeas Corpus contentions.

8 . When your petitioners initiated collateral attack post-conviction applications in the State Courts we were denied without even the opportunity to respond to the States opposition and were told denial was based on the fact we relied solely on newspaper articles. (See exhibits attached to Habeas Corpus petition). We were granted no hearing at all nor a chance to respond.

9 . Petitioner's beseech this Court to take the time and read our petition together with attached affidavits and it will appear very clearly that none of our allegations are based on newspaper articles, only on documentary proof and that the State erred in not hearing our claims of constitutional violation.

10. Lastly we quote one last passage from Stone v. Powell, at Page 3341:

" In sum we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief..."

Wherefore, we pray this Court will find that we could not have raised the issues herein at trial or on direct appeal of our conviction because the main issue[evidence] was not learned until three years later, and that the State did not provide us with a full and fair hearing nor an opportunity to hear our collateral claims.

Respectfully submitted,

Martin Hernandez
Martin Hernandez, # 18347

Victor Hernandez
Victor Hernandez, # 18348
Drawer B
Storreville, New York 12582

Sworn to before me this
21 day of December, 1976

John W. Graham
NOTARY PUBLIC
JOHN W. GRAHAM
Notary Public, State of New York
Residing in Dutchess County
Commission Expires March 30, 1978

— Werker. J. — ✓

(5)

AFFIDAVIT OF A. SMULEVITZ SWORN
TO JANUARY 12, 1977
(ppl29a & 130a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAN 15 1977

-----X

UNITED STATES OF AMERICA ex rel. :
MARTIN HERNANDEZ and VICTOR :
HERNANDEZ, :

Petitioners, :

-against- :

WALTER FOGG, Superintendent, :
Green Haven Correctional Facility :
Stormville, New York, :

Respondent. :

-----X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

AFFIDAVIT

76 Civ. 4747
(H.F.W.)
Pro Se

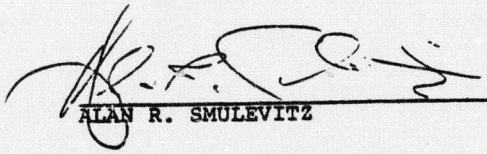
RECORDED IN CHANCERY
OF JUDGE HENRY F. WERKER
JAN 15 1977

ALAN R. SMULEVITZ, being duly sworn, deposes and
says:

1. I am an Assistant Attorney General in the office of LOUIS J. LEFKOWITZ, Attorney General of the State of New York, attorney for respondent.
2. I am in receipt of the affidavit of petitioners, Martin Hernandez and Victor Hernandez, sworn to December 21, 1976, and denominated "Traverse".
3. In their traverse, petitioners state that your affiant appeared without notice to them before Hon. Jack B. Weinstein, resulting in transfer of this case to the Southern District of New York. I did not appear before Judge Weinstein. The District Attorney of Westchester County in his memorandum of law herein requested dismissal for lack of subject matter jurisdiction. In response thereto, Judge Weinstein issued a Memorandum and Order dated October 7, 1976, transferring this action (76 Civ. 1495) from the Eastern District to the Southern District (76 Civ. 4747).

4. In their traverse, petitioners state that your affiant obtained a string of unreasonable delays. I requested adjournments only on two occasions, by affidavit submitted to Court with reasons therein. Copies of said affidavit were served on petitioners. Affiant's second request for adjournment, by affidavit sworn to October 22, 1976, was submitted through the office of the Pro Se Clerk; this action had been transferred to the Southern District, but a docket number had not yet been assigned. Attached herewith is a copy of a letter to Hon. George C. Pratt from Alan R. Smulevitz, dated August 31, 1976, and marked Respondent's Exhibit "A", a copy of which was sent, with a copy of an affidavit requesting an adjournment, and a proposed order, to petitioners. Also, attached herewith is a copy of a letter to the Pro Se Clerk from Alan R. Smulevitz, dated October 22, 1976 and marked herein as Respondent's Exhibit "B", a copy of which was sent, with a copy of affiant's October 22, 1976 affidavit and a proposed order to petitioners.

WHEREFORE, for the reasons set forth in the memorandum of law submitted by Hon. Carl A. Vergari, District Attorney of Westchester County, and set forth in the affidavit of Alan R. Smulevitz, sworn to November 23, 1976, respondent respectfully requests that the instant petition be dismissed in all respects.


ALAN R. SMULEVITZ

Sworn to before me this
12th day of January, 1977

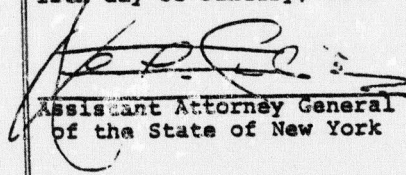

Assistant Attorney General
of the State of New York

EXHIBIT A - LETTER DATED AUGUST 31,
1976, ANNEXED TO AFFIDAVIT OF A. SMULEVITZ



LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

STATE OF NEW YORK
DEPARTMENT OF LAW
TWO WORLD TRADE CENTER
NEW YORK, N.Y. 10047
TELEPHONE: 488-3385

JOEL LEWITTES
ASSISTANT ATTORNEY GENERAL
IN CHARGE OF
LITIGATION BUREAU
MARIA L. MARCUS
DEPUTY BUREAU CHIEF

August 31, 1976

Re: Hernandez & Hernandez
v. Fogg
76 Civ. 1495 Pro Se

Hon. George C. Pratt
United States District Judge
United States Courthouse
225 Cadman Plaza
Brooklyn, New York 11201

Honorable Sir:

Pursuant to my discussion with Mr. Fred Parnon of your office, I am enclosing herewith an affidavit and proposed order for adjournment in the above-captioned habeas corpus case. I just received the file and need additional time to obtain the record from state and federal courts and prepare a memorandum of law and affidavit.

This action is returnable before Hon. Jack B. Weinstein. Judge Weinstein and his staff will not return until after Labor Day, according to the Clerk's office. Therefore, I am submitting my application to you, since the return date falls on September 5, 1976.

Thank you for your attention to this matter.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By

ALAN R. SMULEVITZ
Assistant Attorney General

ARS:bm
Enc.

cc: Hon. Jack B. Weinstein
United States District Judge
United States Courthouse
225 Cadman Plaza
Brooklyn, N.Y. 11201

Mr. Martin Hernandez, # 18347
Mr. Victor Hernandez, # 18348
Green Haven Correctional Facility
Stormville, New York 12582

-131a-

EXHIBIT "A"

EXHIBIT B - LETTER DATED OCTOBER 22,
1976, ANNEXED TO AFFIDAVIT OF A. SMULEVITZ

488-4297
438-3385

October 22, 1976

Re: Hernandez v. Fogg
76 Civ.

Hon. Pro Se Clerk
United States Courthouse
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Honorable Clerk:

The above captioned case was filed in the Eastern District (76 Civ. 1495). On October 8, 1976 the Clerk of the Eastern District forwarded the enclosed Memorandum and Order of Hon. Jack B. Weinstein to all parties herein, in effect directing transfer of this action to the Southern District.

I am enclosing an affidavit and proposed order for an adjournment to November 24, 1976.

Thank you for your attention to this matter.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By

ALAN R. SMULEVITZ
Assistant Attorney General

ARS:ld
Enc.

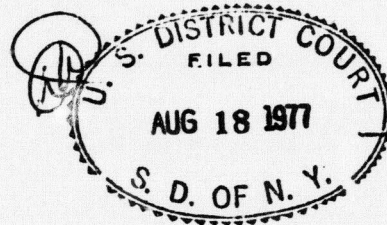
cc: Victor Hernandez, # 18348
Drawer B
Greenhaven Correctional
Facility
Stormville, N.Y. 12582

Janet Cunard, Esq.
Assistant District Attorney
Office of District Attorney
of Westchester County
County Courthouse
111 Grove Street
White Plains, New York 10601

OPINION OF J. WERKER, DATED AUGUST
15, 1977
(pp. 133a to 139a)

7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



MARTIN HERNANDEZ and VICTOR
HERNANDEZ,

Plaintiffs,

- against -

WALTER FOGG, Superintendent, Green
Haven Correctional Facility, Stormville,
New York,

Defendant.

OPINION

76 Civ. 4747 (HFW)

46283

APPEARANCES: (See last page)

HENRY F. WERKER, D. J.

Petitioners Martin and Victor Hernandez,¹ who are brothers, were convicted after trial in 1971 in Westchester County Court, Indictment No. 852-70, for criminal possession of a dangerous drug in the first degree and selling a dangerous drug in the first degree. On September 13, 1971 Martin Hernandez was sentenced to twenty-five years to life and Victor Hernandez to twenty years to life. The judgments were affirmed by the Appellate Division and leave to appeal was denied by the New York State Court of Appeals.²

Their habeas corpus petition is based on petitioners' contention that corruption pervaded the Special Investigations Unit of the New York City police department at the time of the investigation preceding their indictment and more specifically that their arrest was a result of an illegal tap which was placed on the telephone of the Chile Lindo Restaurant on 23rd

RECEIVED
AUG 19 1977

Street in Manhattan. Petitioners allege that although a wiretap order was lawfully obtained in September of 1970 of one James Miller, a street-level dealer in drugs, that rather than their arrest resulting from information obtained through the Miller tap and information obtained subsequent to that, that in fact the arrest of petitioners and their co-defendants was occasioned by the illegal Chile Lindo tap. They further allege that the informant who was said to have supplied information which served as the basis for the application for the Miller wiretap order was fictitious and that the real source of information was the illegal tap.

The basis for petitioners' allegations concerning the illegal tap is testimony which was elicited at a hearing on November 15, 1974 on a motion which was filed by Enrique Hernandez, a brother of these petitioners, under 28 U.S.C. § 2255, after his conviction on a narcotics charge in federal court in the Eastern District of New York. At that hearing one James Sottile, formerly an officer in the State's Special Investigations Unit, testified to the fact that there had been illegal taps of the Chile Lindo from September to November of 1970. The petitioners allege that they obtained the record of this hearing in January, 1976.

In light of my conclusion that these petitioners have no basis for their claim in any event, it is unnecessary for me to resolve the issue of whether or not these petitioners had a reasonable expectation of privacy in using the Chile Lindo telephone and thus a fourth amendment claim to raise. The petitioners allege only that they utilized the Chile Lindo telephone but do not state that it was a public telephone or that if it was one that it was enclosed in a booth. Nor is there any testimony on this issue at the Enrique

Hernandez hearing other than the fact that the tap was maintained on the sole telephone at the restaurant.³

Petitioners filed a motion to vacate judgment in state court where they raised, in papers virtually identical to those submitted here, the same claim with regard to police corruption and the alleged illegal Chile Lindo tap. The trial court, Beisheim, J., in a decision of May 21, 1976, denied their motion on the basis that corruption of a state investigatory unit discerned through the news media does not constitute newly discovered evidence. Subsequently, petitioners sought leave to appeal from Judge Beisheim's decision to the Appellate Division which was denied on June 30, 1976.

In light of the fact that petitioners have failed to state facts which would afford them habeas corpus relief, it is unnecessary for me to address the issues raised by Stone v. Powell, 428 U.S. 465 (1976), with regard to whether or not the state has provided these petitioners a full and fair opportunity to litigate their fourth amendment claim. See Gates v. Henderson, No. 76-2065 (2d Cir. Jan. 12, 1977); LiPuma v. Commissioner, No. 77-2006 (2d Cir. July 11, 1977). However, I note that although the state trial court conducted no hearing on the petitioners' motion to vacate judgment, that court in ruling on the basic contention upon which the petitioners' motion was based — a generalized charge of corruption — gave a reasonable basis for denying their motion in stating that vague allegations of corruption in the Special Investigations Unit do not serve as the basis for a challenge to a conviction.

These petitioners are not bound by the testimony adduced at

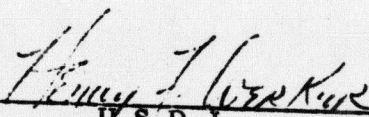
the Enrique Hernandez proceeding to which they were not parties. However, the only factual basis for this habeas petition is the testimony at Enrique Hernandez's hearing, and that testimony directly contradicts the allegations made by the petitioners. Although one Detective Sottile, who conducted an investigation in 1970 of certain individuals who frequented the Chile Lindo restaurant other than these petitioners or their co-defendants, testified to the fact that an illegal tap was placed on the Chile Lindo restaurant from sometime in early September, 1970 to November, 1970, tr. at 7, and that during that period, Enrique Hernandez talked to both brothers over the telephone from that restaurant concerning drug transactions and that he also received calls from his brothers there, tr. at 44-45, the transcript also reveals that the detective who was working on the matter involving the petitioners and whose affidavit served as the basis for the application for the Miller wiretap, Detective Brodeur, knew nothing about the fact that the illegal tap was taking place at the time. Tr. at 39-40. Nor did Detective Sottile know about the investigation concerning these petitioners and their co-defendants at the time of his own investigation. Tr. at 30. Detective Sottile further testified that he had no conversations with those detectives who were working on the investigation surrounding the petitioners, tr. at 30, and that it was only when he was called to testify at the Enrique Hernandez hearing that he learned that the arrest of the defendants in the investigation on which he was working had any relationship to the investigation related to these petitioners. Tr. at 30. Nor did he know that any wiretaps were being conducted with respect to James Miller. Tr. at 30-31. Detective Sottile merely testified that he obtained general leads about drug traffic from the

taps, tr. at 12, and that although he heard the voice of Mario Sepulveda (one of the petitioners' co-defendants who later pled guilty) on the wiretap, that he never obtained the names of any of petitioners, their other co-defendants or of James Miller through the tap. Tr. at 9-11. Detective Brodeur testified at the hearing that the first time that he learned of the illegal Chile Lindo tap was several days prior to Enrique Hernandez's hearing.

The only facts on which petitioners pin their claim are refuted by the testimony which they cite. Nor do petitioners allege that the facts are not as indicated by the uncontradicted testimony at the Enrique Hernandez hearing. The petition does not therefore set forth facts sufficient to raise a claim of constitutional proportions and thus must be denied. Collins v. McDonald, 258 U.S. 416 (1922); Blair v. California, 340 F.2d 741, 742 (9th Cir. 1965); United States ex rel. Lowery v. Murphy, 245 F.2d 751 (2d Cir. 1957).

SO ORDERED

DATED: New York, New York
August 15, 1977



U. S. D. J.

NOTES

1. C.J.A. counsel was appointed on January 4, 1977 primarily to supply this court with records and transcripts of the state and federal court proceedings with which these petitioners were involved. Decision on the petition has been delayed while the court awaited counsel's obtaining and submitting these documents to the court.
2. Although this petition concerns only their state court conviction, petitioners were also sentenced on February 13, 1972 on a conviction in federal court, 71 Cr. 874 (E.D.N.Y.), for narcotics conspiracy, Martin receiving fifteen years and Victor ten years, with the court recommending in each instance that the sentence be served in a state facility. These judgments were affirmed.
3. If the telephone in question was a public telephone in a booth, the issue as to whether or not the petitioners have a fourth amendment claim would be resolved in their favor by the Supreme Court's ruling in Katz v. United States, 389 U.S. 347 (1967). On the other hand, if the telephone in question was a public telephone unit affixed directly to the wall and not enclosed in a booth, or a telephone privately issued to the Chile Lindo, the resolution of the issue might be different. See Alderman v. United States, 394 U.S. 165 (1969); United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974).

APPEARANCES:

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By: Janet Cunard
Assistant District Attorney
Of Counsel

- - - office

CERTIFICATE OF PROBABLE CAUSE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA ex rel.
MARTIN HERNANDEZ and VICTOR HERNANDEZ,

Petitioners,

-against-

WALTER FOGG, Superintendent, Green
Haven Correctional Facility, Stormville,
New York,

Respondent.
-----X

CERTIFICATE OF
PROBABLE CAUSE

76 Civ.4747(HFW)

Upon the application of MARTIN E. GOTKIN, Esq.
attorney for the above named Petitioners a Certificate of
Probable Cause is granted to the Petitioners pursuant to
Rule 22(b) of the Federal Rules of Appellate Procedure.

SO ORDERED

Dated: New York, N.Y.

August 31, 1977

Henry H. Harker

U.S.D.J.

: : : : *Office*

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA ex rel.
MARTIN HERNANDEZ and VICTOR HERNANDEZ,

Petitioners,

NOTICE OF APPEAL

-against-

76 Civ.4747(HFW)

WALTER FOGG, Superintendent, Green Haven
Correctional Facility, Stormville,
New York,

Respondents.

-----X

S I R S :

PLEASE TAKE NOTICE that Petitioners MARTIN HERNANDEZ and VICTOR HERNANDEZ hereby appeal from the order rendered by the Honorable Henry F. Werker dated August 15, 1977 and filed on August 18, 1977 of the United States District Court for the Southern District of New York, to the United States Court of Appeals for the Second Circuit insofar as the aforesaid order denied petitioners relief. Petitioners appeal from each and every part of that portion of the aforesaid order which denied petitioners relief.

Dated: New York, N.Y.
August 31, 1977

Yours, etc.

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Attorney General of the State
of New York
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New York, N.Y. 10047

LEAVE TO APPEAL IN
FOUMA PAYMENTS GRANTED.
Henry F. Werker
U.S.D.S.

Appeal Reproductions, Inc., 217 Broadway, New York, N.Y. 10007, Tel.: 333-6626